STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY EMPLOYEES' RETIREMENT SYSTEM
and WAYNE COUNTY RETIREMENT COMMISSION,

Plaintiffs-Counterdefendants-Appellees

Supreme Court No. 147296

Court of Appeals No. 308096

v.

Wayne County Circuit Court
Case No. 10-013013-AW
Hon. Michael F. Sapala

CHARTER COUNTY OF WAYNE,

Defendant-Counterplaintiff-Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

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BRIEF OF
AMICUS CURIAE
MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS

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INTEREST OF *AMICUS CURIAE*

The Michigan Association of Public Employees Retirement Systems ("MAPERS") is an organization comprised of over one hundred and thirty (130) public employee retirement systems in the State of Michigan. Accordingly MAPERS possesses an interest in this matter and thus respectfully provides this brief of *amicus curiae* for consideration.

Michigan public employee retirement systems were established to provide retirement, disability and death benefits to the employees and beneficiaries of state, county, city, village, township, school districts or other local units of government. Membership in these retirement systems is comprised of public employees such as police officers, firefighters, teachers, judges, clerical, maintenance, and all other eligible municipal employees who rely on the proper administration, management and operation of such benefits during and after their public service. Michigan public employee retirement systems cover approximately 500,000 active employees, 250,000 retirees/beneficiaries, and contain over $75 billion dollars in assets. It is those significant and constitutionally protected benefits provided by public employee retirement systems, and the assets contained therein, which the boards of trustees/retirement commissions[1] of those systems are entrusted to safeguard and authorized to protect. MAPERS' primary purpose is the promotion of public employee retirement systems through education and other activities which seek to strengthen and protect public employee retirement systems in the State of Michigan.

Michigan public employee retirement systems have a significant interest in the resolution of the issues before this Court. Specifically, resolution of this case which relates to the authority and autonomy of the board of trustees of a public employee retirement system, the benefits provided thereunder, and the required employer contributions necessary to fund the system will have a direct and significant impact on the administration of public employee retirement systems throughout the State of Michigan. MAPERS has filed this brief as Amicus Curiae in support of the Retirement Commission of the Wayne County Employees' Retirement System's position that: (1) a Retirement Commission's discretion to provide a post-retirement benefit to retirees pursuant to a 13th check program (i.e., the Inflation Equity Fund "IEF") is an accrued financial benefit under Article IX, Section 24 of the Michigan Constitution; (2) any unilateral action by the employer sponsor of a public employee retirement system to utilize retirement trust fund assets as a credit against the employer's annual required contribution is a violation of Article IX, Section 24 of the Michigan Constitution and the Public Employee Retirement System Investment Act ("PERSIA") (MCL 38.1132, *et seq.*); and (3) the discretionary authority to provide a post-retirement benefit to retirees is protected by the Public Employment Relations Act ("PERA") (MCL 423.201, *et seq.*)

1 The administrative and governing body of the Wayne County Employees' Retirement System is known as the

STATEMENT OF FACTS

MAPERS adopts and relies on the Statement of Facts contained in Plaintiffs-Counterdefendants-Appellees Wayne County Retirement Commission's briefs filed to this Court. MAPERS would additionally state that there are numerous public employee retirement systems throughout Michigan which administer and manage a program and fund similar to the 13th Check Program and the Inflation Equity Fund of the Wayne County Employees' Retirement System. Other retirement systems may refer to such programs synonymously as excess earnings programs, minimum benefit programs, or post-retirement adjustment programs. Despite the different titles these programs generally operate and/or were established in similar manners (i.e., by ordinance of the local governing body).

Again, similar to the Wayne County IEF at issue, many were established via ordinance while others were adopted through collective bargaining and/or pursuant to the Fire Fighters and Police Officers Retirement Act; Public Act 345 of 1937; MCL 38.551, *et seq.*. Notwithstanding the manner or method of establishing the programs, all of the sponsoring municipalities properly established the programs within the existing retirement system and granted discretion over the accumulation and investment of program funds to the governing board of trustees of the applicable retirement system. Some of the programs also provided specific guidelines regarding the distribution of the funds to retirees. However, most importantly, each municipality has recognized that the fund is a part of the retirement system's assets and not subject to reversion to the employer, and the distribution of the funds are to be administered by the retirement system's board of trustees.

Retirement Commission, and will thus be so referred to throughout this brief of *amicus curiae*.

STATEMENT OF JURISDICTION

MAPERS adopts and relies on the Statement of Jurisdiction contained in Plaintiffs'-Counterdefendants'-Appellees' briefs before this Court.

STANDARD OF REVIEW

MAPERS adopts and relies on the Standard of Review as contained in Plaintiffs-Counterdefendants'-Appellees' briefs before this Court.

ARGUMENT

I. THE AUTHORITY OF AN INDEPENDENT RETIREMENT COMMISSION TO ISSUE DISCRETIONARY SUPPLEMENTAL RETIREMENT BENEFITS TO RETIREES AND BENEFICIARIES IS AN ACCRUED FINANCIAL BENEFIT SUBJECT TO THE PROTECTION OF ARTICLE IX, SECTION 24 OF THE MICHIGAN CONSTITUTION.

This Court has requested that the parties respond to two questions in addition to those issues presented in the parties' applications for leave to appeal and briefs, one of which was the constitutional protection afforded to the IEF pursuant to Article IX, Section 24. The County, along with the Trial Court, has taken the incorrect position that the IEF is not an accrued financial benefit because the payments from the IEF are discretionary; the collective bargaining agreements do not require or mandate the payment of the 13^{th} check; and the 13^{th} checks are not earned for service in the year rendered. These conclusions are incorrect for reasons discussed *infra*. The County's analysis is misguided regarding the application of Article IX, Section 24 of the Michigan Constitution because it does not fully distinguish between the funding provision and the accrued financial benefit provision of Article IX, Section 24 both of which are directly applicable to the issues before this Honorable Court. The Court of Appeals did not directly address the constitutional issue.

It is not the "mandate" for the issuance of a 13^{th} check that is the constitutionally protected benefit in this instance but, rather, that an independent board of trustees has the written authority and discretion to issue such a check when funds are available, which authority the Retirement Commission has historically possessed and exercised annually. Simply put, if one has the express authority and discretion to do something and that authority and discretion is taken away, there is a diminishment and impairment of that person's authority and discretion.

The subject Wayne County Ordinance limitation on this discretion and the cap placed upon both the reserve fund itself and the maximum amount of distribution has resulted in an unlawful diminishment and impairment of the accrued financial retirement benefits of the Wayne County retirees and beneficiaries. The retirees and beneficiaries have an accrued right in the Retirement Commission's discretion to issue a 13th check. The 2010 Ordinance limited the Retirement Commission's authority and discretion in this instance.

In *Association of Professional and Technical Employees v City of Detroit*, 154 Mich App 440; 398 NW2d 436 (1986), the employer sought to add additional conditions to an employee's eligibility to receive vested pension benefits through a tentative contract agreement which the plaintiffs ultimately rejected. The employer thereafter sought to unilaterally impose the added eligibility requirements to those employees who did not resign or retire by a certain date. The trial court found that the employer's proposed actions violated Article IX, Section 24 of the Michigan Constitution. The employer appealed. The Court of Appeals affirmed the trial court's judgment for the plaintiffs.

Specifically, the employer argued that the "accrued financial benefits" only arise upon an employee's retirement and do not exist while the employee is still working, as the County argues at bar. The Court of Appeals rejected that argument and held:

> [T]he defendant city's proposed unilateral imposition of a minimum age requirement in this case directly diminishes and impairs plaintiffs' 'accrued financial benefits.' If defendant city were allowed to impose this minimum age requirement, **it would substantially delay the receipt of pension benefits related to work already performed by plaintiffs.** Id. at 446 [emphasis added].

That court relied in large part upon an advisory opinion of the Michigan Supreme Court in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659; 209 NW2d 200 (1973) in concluding that Article IX, Section 24 protects benefits accrued during employment, such as the right to receive a 13th check once a retiree.

In *Studier v Michigan Public School Employees' Retirement Board, et al.*, 472 Mich 642; 698 NW2d 350 (2005), another of this Court's opinions for guidance at bar, the defendants effected changes to the copays and deductibles for health care benefits related to the plaintiff retirees. The plaintiffs argued that the same constituted a violation of, among other laws, Article IX, Section 24 of the Michigan Constitution. The Michigan Supreme Court disagreed and said that health care benefits are not "accrued financial benefits".

First, the Court said that health care benefits are not "financial" benefits because no money is provided to the retiree: "Accordingly, the ratifiers of our Constitution would have commonly understood 'financial' benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits." *Id.* at 655.

With respect to "accrued financial benefits", the *Studier* Court stated that Article IX, Section 24 protects "those financial benefits that increase or grow over time... [and] that 'accrued' financial benefits consist only of those 'financial benefits arising on account of service rendered in each fiscal year.'" *Id.* at 654-655. The *Studier* Court also stated though that "the ratifiers of our Constitution would have commonly understood 'financial' benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary such as health care benefits." *Id.* At 655.

Here, the Retirement Commission was granted the discretion to distribute the assets in the IEF. The Retirement Commission, in exercising its discretion to effect the terms of the IEF, was able to provide a monetary (i.e., financial) benefit to each eligible retiree or beneficiary. While the IEF is not guaranteed to be distributed every year, the Retirement Commission had the discretion to determine whether to make such a distribution every year. Subsection (d) of the Inflation Equity Program as contained in the 2010 Ordinance Amendment (Sec. 141-32(c)) specifically provides that the formula for distributions as determined by the Retirement Commission, "shall take into account the period of retirement and **period of credited service.**" (Emphasis added).

In *Advisory Opinion Re Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011), the Court addressed the issue of whether the tax-exempt status of public employee retirement benefits was an accrued financial benefit pursuant to Article IX, Section 24. When deciding that the tax exemption was not an accrued financial benefit, this Court stated that:

> [t]his clause confirms that a tax exemption is not an 'accrued financial benefit' protected by §24 because it would be impossible to fund a tax exemption, as opposed once again to the pension itself, in the year that the service was rendered in light of the fact that an exemption's value is entirely a function of the tax rate of the taxpayer at the time that the exemption is actually taken – something that obviously cannot be known at the time the services themselves are rendered. Id. At 315

The Court also stated that "the 'deferred compensation' protected as a 'contractual obligation' by §24 is the pension payments themselves earned by the retiree, while the tax exemption is something distinct and not the subject of §24." *Id.* at 317 Further, the Court stated that "a retiree cannot be deprived of retirement benefits but can be deprived of the tax exemption underscores the fact that the 'accrued financial benefit' of a pension plan is the pension income itself, not any tax exemption that might at some moment in time be attached to that income." *Id.* at 317-318

The Retirement System has noted in its application for leave to appeal and in its supplemental brief before this Court that all members of the defined benefit plans are eligible for a 13th check unless that benefit was bargained away through collective bargaining. The IEF is a program that was intended to address the impact of inflation on the retirees' pension income. The IEF Ordinance specifies the formula to be used in calculating these checks based upon each retiree's period of service and length of time retired. The distributions from the IEF are based on both the amount available for distribution and a total number of units for each retiree who is eligible to participate in the program. A unit is a year of service or a year of retirement. The amount is divided by total number of units to determine the value of each. The 13th check for each retiree or beneficiary is then determined by multiplying the number of units each individual has earned by the value of each unit. The IEF distribution is clearly a financial benefit that increases over time based on the amount of service rendered to Wayne County ("County"), and the number of years each retiree has been retired. Accordingly, the Retirement Commission's discretion over the distribution of a monetary payment to eligible retirees and beneficiaries is an accrued financial benefit that is protected under Article IX, Section 24 of the Michigan Constitution.

Further, the County's assertion that the 13th checks are not earned for service in the year rendered is also incorrect. Each day and year that an employee of the County works, he or she accrues additional retirement benefits based upon that service rendered. Before the 2010 Ordinance, the IEF was an enforceable part of the Retirement Ordinance and eligibility for the IEF payment was referenced in the applicable collective bargaining agreements. The eligibility, distribution, and amount of a 13th check is based upon a County employee's attainment of retirement eligibility, his or her length of service, the amount of retirement benefits received, and his or her years of retirement.

Accordingly then, eligibility for the 13th check is earned for service in the year rendered throughout an employee's employment. Each year an employee works, the employee is credited with an additional year of service credit and becomes closer to attainment of retirement eligibility. Retirement and service credit are both factors in determining 13th check eligibility and the amount of the retirees' respective distributions.

Further, the County has also asserted that distributions from the IEF cannot be considered accrued financial benefits because they are not funded in the year the service was rendered. This is not true. The IEF was well-funded before the 2010 amendments to the Retirement Ordinance. Also, the IEF was funded by operation of the specific provisions of the Retirement Ordinance

This is not a case brought because the Retirement Commission in exercising its discretion resolved not to issue a 13th check. It is true that the "issuance" of a 13th check is not mandated. Rather, this case is about the action taken by the County in capping the size of the reserve fund and the distributions from the fund, thereby diminishing and impairing the Retirement Commission's authority and discretion to issue the 13th check – a direct financial benefit to retirees and beneficiaries.

II. THE AUTHORITY OF AN INDEPENDENT RETIREMENT COMMISSION TO ISSUE DISCRETIONARY SUPPPLEMENTAL RETIREMENT BENEFITS IS A CONTRACTUAL BENEFIT WHICH THE PUBLIC EMPLOYMENT RELATIONS ACT PROTECTS.

Retirement benefits are mandatory subjects of collective bargaining under PERA. The Michigan Supreme Court has consistently held that PERA must be viewed as the dominant law regarding public employment relations. *Local 1383, International Association of Firefighters, AFL-CIO v City of Warren*, 411 Mich 612; 307 NW2d 66 (1981). Clearly, retirement benefits for active public employees may be amended through a collective bargaining agreement consistent with PERA. In any event, an individual is entitled to the pension benefits as they exist in the pertinent collective bargaining agreement at the time of his or her retirement. *Detroit Fire Fighters Association v City of Detroit*, 127 Mich App 673; 339 NW2d 230 (1983).

In 1982, the Michigan Court of Appeals upheld a decision by the Michigan Employment Relations Commission which held that the composition of the board of trustees of the two City of Detroit retirement systems was a mandatory subject of collective bargaining under PERA. *City of Detroit v Michigan Council 25, et al* 118 Mich App 211; 324 NW2d 578 (1982). There, the City of Detroit adopted a new ordinance that added the City's Finance Director and Personnel Director to the retirement system board of trustees; allowed only the city representatives to the board of trustees to designate alternates; and failed to adjust the quorum to account for the additional members thus allowing the City representatives to conduct retirement system business without the employee representatives being present. The Court of Appeals noted that PERA imposes a duty to bargain upon public employers with respect to wages, hours and other terms and conditions of employment.

Michigan cases have adopted a broad, expansive approach to determining whether a particular subject is a mandatory subject of collective bargaining in order to protect public employees who are forbidden from striking under PERA. Determining what is a mandatory subject of collective bargaining is done on a case-by-case basis. The test is "whether the matter has a significant impact upon wages, hours, or other conditions of employment, or settles an aspect of the employer-employee relationship." *City of Detroit, supra* at 216. The Court of Appeals determined that the boards of trustees held substantial power and discretion and could have an impact on other conditions of employment. Accordingly, the Court of Appeals held that the composition of the boards of the City of Detroit's retirement systems was a mandatory subject of collective bargaining.

Similarly, in 2006, the Michigan Court of Appeals again confirmed that the composition of the board of trustees of one of the City of Detroit retirement systems was a mandatory subject of collective bargaining pursuant to PERA. *Werdlow, et al v City of Detroit Policemen and Firemen Retirement System Board of Trustees, et al*, 269 Mich App 383; 711 NW2d 404 (2006). In that case, an arbitration panel's decision altered the composition of the board of trustees such that the balance between employee and employer representatives was shifted to the employer as an additional employer representative was added. The Court of Appeals determined that the composition of the board of trustees has a significant effect on employee benefits and was therefore a mandatory subject of collective bargaining citing its prior decision in *Detroit Fire Fighters Association, supra*.

In the instant case, the Retirement Ordinance and the applicable collective bargaining agreements reference eligibility for the 13th Check. The authority and discretion to distribute these financial benefits is clearly vested with the Retirement Commission. The discretion over the distribution of a significant financial benefit clearly has an effect on wages, hours, and other conditions of employment. If the composition of a board of trustees is a mandatory subject of collective bargaining agreement because it has a significant effect on employee benefits, then the discretion of a board of trustees over the frequency of distributions of the 13th check and the amount of the distribution should similarly be considered a mandatory subject of collective bargaining.

The trial court stated that the applicable collective bargaining agreements reference eligibility for the 13th check, but do not require or mandate the payment of the 13th check. However, the County has provided in its appendix to its brief a chart of relevant collective bargaining provisions which clearly shows that a number of collective bargaining units are entitled to distributions from the IEF in lieu of post-retirement cost of living adjustments. The applicable collective bargaining agreements, however, also incorporated by reference the remaining terms and provisions of the Retirement Ordinance. Additionally, this matter has been the subject of a State of Michigan Employment Relations Commission Hearing, *Wayne County v. Michigan AFSCME Council 25, AFL-CIO*, Case No. C10 J-266, MERC Docket No. 10-000060 where one of the collective bargaining units filed an unfair labor practice charge against the County regarding numerous issues including the limitations imposed on the IEF. Administrative Law Judge Doyle O'Connor in his findings noted that:

The availability of yearly IEF 13^{th} Checks was expressly held out to active employees as part of their contractually guaranteed deferred pay in exchange for their labor on behalf of the County, including at the bargaining table by Yee as the County's chief negotiator.

***

The parties agreed to the IEF methodology as a way of providing a hedge against inflation as part of employee benefits, while taking control of it away from the political process at the County Commission. The parties subsequently agreed to exclude employees hired after certain dates from receiving IEF checks. Even though the precise amount of the IEF checks was never guaranteed, but depended on the markets, by express agreement the precise amount was ultimately controlled by the employee-dominated Board of Trustees exercise of their discretion and by the existence of the IEF reserve funds. That market relationship is now gone, the Trustees discretion is gone, and the IEF reserves are gone as the Employer has raided the cookie jar.

Administrative Law Judge O'Connor also noted that:

the statutory right of employees to not have their wages unilaterally cut, the length of their workweek shortened, their continued receipt of health insurance coverage denied, or as here, the continued functioning of the negotiated IEF gutted, do not need to rise to the level of Constitutionally-protected rights to be nonetheless protected by PERA.

Finally, Administrative Law Judge O'Connor determined that:

The County cannot now unilaterally change existing conditions of employment without violating PERA any more than it could have during the earlier economic downturn of 1982-1983. The retirement related benefit cuts were an unlawful unilateral change in basic conditions of employment implemented in violation of the County's well-established obligations under Section 10(1)(e) of PERA to bargain in good faith, to refrain from repudiating prior agreements, and to maintain pre-existing conditions of employment during the bargaining process.

It is clear then, that under PERA, retirement benefits are mandatory subjects of collective bargaining. Retirement benefits include those items that have a significant impact on employee benefits and on the basic conditions of employment. As Administrative Law Judge O'Connor determined, cuts to the IEF violated the parties' collective bargaining agreement and violated PERA.

Therefore, as a mandatory subject of collective bargaining the County cannot unilaterally amend the Retirement Ordinance, cannot remove or limit the Retirement Commission's discretion over the IEF, and cannot appropriate the assets of the IEF.

III. EVEN IF THIS COURT HOLDS THAT DISCRETIONARY DISTRIBUTIONS FROM THE INFLATION EQUITY FUND ARE NOT ACCRUED FINANCIAL BENEFITS SUBJECT TO THE PROTECTION OF ARTICLE IX, SECTION 24 OF THE MICHIGAN CONSTITUTION, WAYNE COUNTY IS STILL REQUIRED TO FUND THE RETIREMENT SYSTEM ON AN ANNUAL BASIS IN ACCORDANCE WITH THE FUNDING REQUIREMENTS OF ARTICLE IX, SECTION 24 OF THE MICHIGAN CONSTITUTION, AND SECTION 20M OF THE PUBLIC EMPLOYEE RETIREMENT SYSTEM INVESTMENT ACT ("PERSIA") WHICH ALSO REQUIRES THAT PUBLIC EMPLOYERS MAKE ANNUAL EMPLOYER CONTRIBUTIONS TO THEIR RETIREMENT SYSYTEMS TO FUND BOTH THEIR ENTIRE NORMAL COST AND AN AMORTIZED PORTION OF THE UNFUNDED ACCRUED LIABILITY.

The boards of trustees of public employee retirement systems retain an actuary to assist them in the calculation of the annual required employer contributions necessary to fund the plan in accordance with applicable law[2.] The required employer contribution is comprised of two components: (1) the "normal cost", and (2) an amortized payment of the interest and principal of the

2 Both PERSIA and Article IX, Section 24 of the Michigan Constitution require annual funding of the Retirement System by the employer. The annual required contribution to the Retirement System is determined by the Retirement System's actuary.

unfunded accrued liabilities of the plan. "Normal cost" is also referred to as current service cost and is reflective of the ongoing benefit accrual of active employees. The unfunded actuarial accrued liability, upon which an annual amortized payment of principal and interest is required, represents the shortfall of the value of the total accrued benefits promised to active employees and retirees as of the valuation date minus the value of the retirement system's assets as of that date. The required employer contribution consists of the current service payment and an amortized payment of principal and interest on the unfunded accrued liability. In a plan that is less than 100% funded, as is the case with the Wayne County Employees' Retirement System, the employer's required contribution consists of normal cost plus the amortized payment toward the unfunded accrued liability.

If a plan is exactly 100% funded on the date of the valuation, the applicable law still mandates the payment of the "normal cost" to fund the current service accruals of active employees even though there is no unfunded accrued liability upon which an amortized payment is required. Article IX, Section 24; PERSIA, MCL 38.1140m. Conversely, if a plan is overfunded (i.e., 110%), the employer is still required to fund the normal cost of current service, however, there may be applied an overfunding credit based upon the amortized portion of the retirement system assets in excess of its accrued liabilities, PERSIA, MCL 38.1140m, which is discussed elsewhere in this brief. It is noted that at no time during or after the County's application of the $32 million dollars against its required annual contribution was the Retirement System even remotely close to being 100% funded. It has been further noted throughout the record that the Retirement System was underfunded, which was part of the County's motivation for the adoption of the 2010 Ordinance. Accordingly, the overfunding credit would not be applicable here.

The required funding of current service cost is mandated by Article IX, Section 24 of the Michigan Constitution which provides in pertinent part as follows: "[f]inancial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." Section 20m of PERSIA also mandates the funding of current service costs as well as the amortized payment for the unfunded accrued liabilities of the plan, and provides in pertinent part:

> An annual required employer contribution in a System under this act shall consist of a current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability... For fiscal years that begin after December 31, 2005, the required employer contribution shall not be determined using an amortization period greater than 30 years.

In addition to the constitutional and statutory mandates for required employer funding of public employee retirement systems, most plan documents for public employee retirement systems (e.g., charters, ordinances, and collective bargaining agreements) also contain provisions requiring the boards of trustees to retain the services of an actuary, adopt appropriate actuarial assumptions, and to certify to the employer the required contribution in accordance with applicable laws. The accounting rules of the Governmental Accounting Standards Board also require that boards of trustees of the public retirement systems adopt written funding policies which reflect the employer-sponsor's requirement to contribute to the plan. As noted by Plaintiff-Appellants in their Appeal Brief, Wayne County's Retirement Ordinance provides for such fiduciary action by the Retirement Commission and the mandated funding of employer contributions by the County.

PERSIA clearly requires that the employer-plan sponsor make required annual contributions to the Retirement System. Even if this Court determines that the discretionary distributions are not protected by Article IX, Section 24 of the Michigan Constitution, Wayne County is still required to fund both the normal cost and an amortized portion of the Retirement System's unfunded accrued liability. The County's application of $32 million dollars of Retirement System assets to its required employer normal cost and unfunded amortized payment is improper and does not satisfy the funding mandates of Article IX, Section 24 and PERSIA.

IV. THE WAYNE COUNTY RETIREMENT COMMISSION HAS THE FIDUCIARY AUTHORITY AND LEGAL AUTONOMY TO ADMINISTER THE RETIREMENT SYSTEM, AND ALL OF ITS ASSETS, INCLUDING INFLATION EQUITY FUND ("IEF") ASSETS, ARE ASSETS OF THE RETIREMENT SYSTEM AND NOT THE COUNTY.

The Retirement System provides pension benefits in accordance with: (a) the Retirement Ordinance; (b) the County Pension Plan Act [MCL 46.12a *et seq.*]; (c) applicable collective bargaining agreements; and, (d) applicable federal and state laws and regulations. All of the pension benefits provided by the Retirement System are constitutionally protected under Article IX, Section 24 of the Michigan Constitution of 1963. The Retirement System is a governmental plan, as defined in Internal Revenue Code ("IRC") Section 414(d), and is a qualified plan and trust pursuant to IRC Sections 401(a) and 501(a). The Retirement Commission is vested with the fiduciary responsibility and authority for the proper administration, management and operation of the Retirement System, and for interpreting and making effective its provisions. MCL 46.12a(12); Section 141-35 of the Retirement Ordinance.

It is well-established that the Retirement Commission owes a fiduciary responsibility solely to the Retirement System's participants and beneficiaries, not to Wayne County. PERSIA, MCL 38.1133(3). The Retirement Commission and the County are mutually exclusive with separate and distinct responsibilities created by, and governed under, separate authority. PERSIA, MCL 38.133(8). It is also well-established in state and federal law that each trustee of a retirement board has a fiduciary responsibility to administer a retirement system consistent with plan provisions and in accordance with applicable collective bargaining agreements and federal and state law. PERA, MCL 423.201; IRC 401(a). The language relating to the structure and authority of the Retirement Commission is virtually identical to the vast majority of public employee retirement systems in the State of Michigan. Importantly, the Retirement Commission has the duty to administer the Retirement System and to ensure that each retiree and beneficiary receives those pension benefits to which he or she is legally entitled, no more and no less.

Section 141-35(h) of the Retirement Ordinance, titled "Investment Authority," provides:

> The retirement commission is the trustee of the assets of the retirement system. The retirement commission has the authority to invest and reinvest the assets of the retirement system subject to all terms, conditions, limitations and restrictions imposed by the state on the investments of public employee retirement systems. The retirement commission may employ investment counsel to advise the board in the making and disposition of investments. In exercising its discretionary authority with respect to the management of the assets of the retirement system, the retirement commission shall exercise the care, skill, prudence, and diligence, under the circumstances then prevailing, that an individual of prudence acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and similar objectives.

The necessity for public employee retirement systems to operate independently and autonomously has been squarely addressed by courts in many jurisdictions, including Michigan. Michigan courts, including the Michigan Supreme Court, have repeatedly recognized Michigan public employee retirement systems as independent entities from the municipality, and are individual legal entities with the power to sue and be sued, each independent of the other. *Shelby Township Police and Fire Retirement Board v Charter Township of Shelby*, 438 Mich 247; 475 NW2d 249 (1991); *Bay City Police and Fire Retirees v Bay City Police and Fire Retirement Board*, 2006 WL 2457485 (unpublished opinion, see attached). *McDole v City of Saginaw and City of Saginaw Police and Fire Pension Board*, (unpublished opinion, see attached).

The Retirement System is a "qualified pension plan" under the rules and regulations of the IRC. 26 U.S.C. 414(d). The IRC requires that as a condition of maintaining the Retirement System's qualified plan status, the Board act solely in the best interest of the Retirement System's participants and beneficiaries. 26 U.S.C. Section 401(a). This is the underlying principle of all fiduciary responsibilities and ensures that outside political, social and economic considerations do not interfere with Retirement System administration. The Internal Revenue Code recognizes that the interests to be served by the Retirement Board are those of the Plan and not the County.

The IRC requires the Retirement System to be a separate trust and that it be administered independently. The IRC requires that in order to be a "plan", there must be intended and determinable benefits, beneficiaries, source of funding, and procedures for receiving benefits (26 U.S.C. 401(a)). It is therefore essential that the plan is a separate legal entity and not legally controlled by the employer which sponsors the plan. Otherwise, without the legally enforceable ability to obtain funding, the plan would be an illusion, and the foregoing factors invalidated.

Based on the foregoing, the Retirement System is clearly a separate and distinct legal entity apart from the County. The County does not have the authority over, or control of, the Retirement System or the Retirement Commission. While the County does have the ability to amend or terminate benefit provisions through recognized lawful methods, such as collective bargaining for example, the authority for the general administrative management and operation of the retirement system is vested in the Retirement Commission. The County's authority to amend those benefit provisions is also limited by Section 6.111 of the Retirement Ordinance which states: "[T]he County Commission may amend the ordinance, but an amendment shall not impair the accrued rights or benefits of any employee, retired employee, or survivor beneficiary."

The Retirement Ordinance and PERSIA provide that a fiduciary shall discharge its duties with respect to the plan **solely** in the interest of the participants and beneficiaries and for the **exclusive purpose** of providing benefits and of defraying reasonable expenses of administration, and shall act with the same care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims. Section 13(3) of the Retirement Ordinance; PERSIA MCL 38.1133 (3)(a).

Section 13(1) of PERSIA (MCL 38.1133(1)) provides that, "[t]he provisions of this act **shall supersede any investment authority previously granted to a system under any other law of this state.**" [Emphasis added]. The Retirement Commission is an investment fiduciary pursuant to Section 12c(1)(a) of PERSIA (MCL 38.1132c(1)(a)) which defines the term as one who "[e]xercises any discretionary authority or control in the investment of a system's assets.

Arguments claiming a conflict between the authority of the Retirement Commission to administer and manage the Retirement System under the ordinance with other language contained elsewhere in the ordinance (such as the authority of the County to appoint department heads) are resolved by the plain and unambiguous language contained in the Retirement Ordinance. More importantly, any real or perceived conflict under the ordinance is superseded by the authority granted the Retirement Board under PERSIA as acknowledged by the Court in *Board of Trustees of the Police and Fire Retirement System of the City of Detroit v City of Detroit*, 428 Mich 889; 403 NW2d 809 (1987). While a charter entity may derive its authority from the constitution and a valid state statute, an ordinance will not necessarily displace all other statues which relate to the same subject matter regulated by the ordinance. The power of a city to pass its own laws and ordinances is subject to the constitution and general state law. Therefore, when an ordinance or regulation in some way contravenes state law it must be declared void. *Gray v Wayne County et al.*, 148 Mich App 247; 384 NW2d 141 (1986).

In *Rental Property Owners Ass'n of Kent Co. v Grand Rapids*, 455 Mich 246; 566 NW2d 514 (1997), the Michigan Supreme Court held that state law preempts a municipal ordinance if the ordinance directly conflicts with a state statute. See also *People v Llewellyn*, 401 Mich 314, 257 NW2d 902 (1977); *AFSCME v City of Detroit*, 252 Mich App 293; 652 NW2d 240 (2002). In the AFSCME case the Court stated:

> A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the state statute permits. AFSCME at 310, citing Llewellyn supra at 322, n4.

Based on the foregoing, PERSIA supersedes and preempts the general and permissive authority of the Retirement Ordinance, and the Retirement Commission is vested with broad discretionary powers to manage its assets and make discretionary determinations regarding the administrative, actuarial and funding requirements of the Retirement System, including the assets held in the Inflation Equity Fund. The following PERSIA provisions illustrate this principle.

Section 13(5) of the Public Employee Retirement System Investment Act ("PERSIA") (MCL 38.1133(5)) provides:

> The **system** shall be a **separate and distinct trust fund** and the assets of the system shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system. (Emphasis Added.)

The Retirement Commission's need for autonomy is further highlighted by comments found in the Michigan Commission on Public Pension and Retiree Health Benefits' report to Governor John M. Engler on February 20, 2001.[3] In its report, the Commission determined:

> Pension systems and local governments may disagree over the appropriate amount needed to meet these requirements [funding requirements]. Local officials may face conflicts including budgetary constraints, collective bargaining and political posturing that impinges on payments needed to keep their retirement systems adequately funded. Problems develop when the appropriate amount is not put into the system.
>
> The Michigan Commission, recognizing a potential funding problem, recommended:
>
> The Commission believes that **the board members of a retirement system,** acting upon the recommendation of the retirement system's actuary, are in the best position to establish the actuarial **and funding requirements**. (Emphasis added)

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[3] Governor Engler, by Executive Order No. 1999-13, determined "the funding, management, oversight, and fiscal integrity of public pension and retirement systems is a matter of paramount pubic importance" established the Michigan Commission on Public Pension and Retiree Health Benefits to, among other things, "[r]eview those state laws that govern or affect the funding, management, oversight, and fiscal integrity of public pension and retirement systems."

The Michigan Legislature adopted Public Act 728 of 2002 in direct response to the recommendations made by the Commission. Public Act 728 of 2002 amended PERSIA sections MCL 38.1140h and MCL 38.1140m regarding the issuance of a summary annual report for each retirement system; the need for a supplemental actuarial analysis by the retirement system's actuary before the adoption of pension benefit changes; as well as, the confirmation by the retirement system's governing board that the system has received the annual required employer contribution.

Wayne County is contractually obligated to fund all financial benefits arising on account of service rendered during a year, as determined by the Retirement System's actuaries. The County attempted to pay its annual required contribution ("ARC") for the 2010 fiscal year by using $32 million from the IEF. The County's taking of IEF assets, which were truly and legally Retirement System assets, was simply a re-purposing of Retirement System assets and was not a proper payment of its ARC. The County acknowledges in the 2010 revised Ordinance that it has in fact borrowed the IEF assets stating that the County's Chief Financial Officer would explore "reimbursing" the IEF of the $32 million.

The County claims that the taking was instead simply the repurposing of the IEF assets which was appropriate because those assets were not "defined benefit" assets. Accordingly, the County continues, because they were not defined benefit assets, the County could declare the IEF closed and direct a transfer of those assets into the defined benefit assets of the Retirement System to satisfy its funding obligations as payment of its ARC. This is fallacious and an incorrect statement of the law and retirement system funding practices throughout the State of Michigan.

Article IX, Section 24 of the Michigan Constitution and PERSIA do not reference only "defined benefit plan assets" as Wayne County has asserted. Those provisions refer to retirement system assets or plan assets and do not provide the limitation as the County suggests. Section 13(5) of PERSIA (MCL 38.1133(5)) provides that:

> The **system** shall be a separate and distinct trust fund and the **assets of the system** shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the **assets of the system**. (Emphasis Added.)

Nowhere in PERSIA does the legislature limit these assets to only the defined benefit assets of a retirement system. The County's analysis is incorrect and misplaced, and is wholly without support in law and in fact. Further, the Retirement Commission and its actuary have always considered the IEF assets to be defined benefit assets for purposes of the Retirement System's annual actuarial valuation and for the determination of the employer's annual required contribution.

PERSIA also states only one specific instance when the Retirement Commission may use retirement system assets as an offset to the required annual contribution, and that is when the plan is overfunded[4], which the Wayne County Employees' Retirement System clearly was not and is not. Wayne County asserts that this is not the only way to have an offset to the required contribution. However, pursuant to the common rules of statutory construction, this is the only way to offset an employer's contribution and comply with the constitutional mandate of funding current service costs. If the legislature had intended for multiple offset methods, it would have stated that there were other acceptable possibilities to do so. However, the legislature has provided the only manner in which an offset is acceptable in PERSIA. Pursuant to *sui generis* then, the County's assertion that there are other acceptable methods of offsetting its ARC is incorrect.

4 In this regard, PERSIA states that "in a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability", i.e. the plan is overfunded. (MCL

Further, the ability to apply such an offset is vested with the Retirement Commission. In *Retired Detroit Police and Firefighters Association v Detroit Police Officers Association*, 2010 WL 5129841, the plaintiff retirees sought superintending control over the overfunded retirement system to overturn the board's resolution allowing the city a $25 million credit toward its funding obligation over the course of three years. The Court of Appeals held that the plaintiff retirees did not have standing to pursue the claim noting that:

> Here we conclude plaintiff did not establish a legal cause of action because plaintiff has no right to receive any overfunding from the Retirement System. MCL 38.1140m expressly provides that, "[i]n a plan year, any current service cost payment *may* be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." The word 'may' designates discretion. Thus the discretion to grant an offset to the employer of there is overfunding rests with the Board.

Here then, even if a credit were allowable, the discretion to apply such a credit to the employer's contribution rests with the Retirement Commission not the County.

Finally, an examination of the Retirement Ordinance at issue reveals that there are six separate funds within the Retirement System. Not including the IEF, there are also the reserve for accumulated member contributions, reserve for member accounts, reserve for pension payments, reserve for defined benefit employer contributions, reserve for defined contribution employer contributions, and reserve for undistributed investment income and administrative expenses. Nowhere is there a distinction, as the County suggests, that the reserve for inflation equity is not part of the retirement system trust.

38.1140m).

In fact, what the County has attempted to do is take assets from one reserve fund in the retirement system, the IEF, and transfer those assets as a new employer contribution to the reserve for defined benefit employer contributions. Those IEF reserve funds, if deemed to be in excess of the legally established cap, should instead be credited to the underfunded reserve for pension payments.

If the transfer were allowable, the Retirement Commission, in consultation with its actuary, would have been required to determine the proper procedure by which the "excess funds" in the reserve for inflation equity would have been applied to the retirement system's accrued liabilities and not the County as it has unilaterally done. In any event, the funds should not have been used to directly offset any portion of the County's required contribution. In this respect, therefore, the County's contribution did not meet the constitutional and statutory mandates.

The use of reserve funds is common to Michigan's public retirement systems. Often, a retirement system's assets consist of pension reserve funds, employer reserve funds, member reserve funds, expense funds, and annuity savings funds. All of these funds consist of retirement system assets and are part of the defined benefit plan. Simply because a "reserve fund" may require that its assets be utilized for a specific purpose and not for determining the employer's overall funding requirements for the retirement system does not mean they are not assets of the defined benefit retirement system. As such, they cannot be repurposed to fulfill the employer's funding of the retirement system and the payment of its ARC.

V. THE WAYNE COUNTY 2010 ORDINANCE (1) VIOLATES THE MANDATED FUNDING REQUIREMENTS OF ARTICLE IX, SECTION 24 AND SECTION 20M OF PERSIA; (2) USURPS THE RETIREMENT COMMISSION'S VESTED AUTHORITY AND FIDUCIARY RESPONSBILITY TO ADMINISTER AND MANAGE THE RETIREMENT SYSTEM; AND, (3) USES EXISTING RETIREMENT SYSTEM ASSETS TO FUND THE COUNTY'S ANNUAL REQUIRED CONTRIBUTION.

The 2010 Ordinance adopted by the Wayne County Board of Commissioners amended the "Inflation Equity Programs" section of the Retirement Ordinance (Section 141-32) and the "Financial Objective: Contribution Certification" section of the Retirement Ordinance. These amendments have been summarized in the record as follows:

> (1) The "reserve for inflation equity" was "limited to no more than $12,000,000." Previously there was no limit and at the time of the Ordinance amendment the reserve fund was credited with approximately $46,000,000 in assets; (2) The IEF program was amended to limit the annual distribution from the reserve to the retired members and beneficiaries to $5,000,000. Previously there was no cap; (3) The Ordinance amendment provided that those amounts in excess of the new $12,000,000 limit in the reserve for inflation equity were to be used to offset and/or reduce the County's required employer contribution to the plan and that those assets "thereafter be considered Defined Benefit Plan assets."; (4) A new provision was added allowing the County to reduce or eliminate its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities; (5) A new provision was added requiring that the County CFO explore and report to the County Board of Commissioners whether it would be advantageous to issue bonds as a strategy to fully fund the retirement system and to reimburse the IEF of $32,000,000; and (6) The Financial Objective provision of the Retirement Ordinance, which provided that the contribution requirements for the Retirement System "shall be determined by annual actuarial valuation", was amended to reflect that the contribution requirement could be reduced or eliminated for a fiscal year through the newly amended provisions to the Inflation Equity Program.

The County has constitutional and statutory mandates for required employer contributions. Irrespective of whether the IEF provisions are protected accrued financial benefits, the County's action to take a direct credit and/or offset against its required contribution violates Article IX, Section 24 of the Michigan Constitution and Section 20m of PERSIA. If the funds in the Retirement System's reserve for inflation equity are held to be unprotected by the Constitution, then they appropriately would be credited against the unfunded accrued liabilities of the retirement system. This credit would have reduced the unfunded accrued liabilities of the retirement system, but would not have eliminated it entirely. The County would therefore still have been required under the applicable legal mandates to fund the current service cost (normal cost) and the amortized payment for the principal and interest on the remaining unfunded accrued liabilities. The County's reduction of its annual required contribution by the $32,000,000 in the reserve fund is a direct violation of the Constitutional and statutory funding mandates.

Likewise, the provision of the 2010 Ordinance which provides that the County can reduce or eliminate "its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities" violates the current service cost contribution provision of Article IX, Section 24, as well as the contribution and actuarial requirements under PERSIA. First, as noted in detail earlier, the applicable constitutional and statutory provisions mandate complete funding of current service cost and an amortized payment of the unfunded accrued liabilities. In a system that is "overfunded", there **may** be an amortized portion of that over-funding applied against the current service cost, but there is no authority to take a complete offset under applicable law. However, the Retirement System is far from being overfunded. Secondly, the authority to set the appropriate amortization period and actuarial funding policy pursuant to Section 20m of PERSIA is vested in the Retirement Commission, not the County.

In addition, the County's Ordinance contains explicit provisions which require the County to make contributions to the Retirement System. Even the ordinance provisions from the challenged ordinance amendment, which are set forth in pertinent part below, recognize the County's legally required duty to fund the Retirement System:

Section 141-36. – Financial objective; contribution certification.

(a) *Financial objective.*

(1) The financial objective of the retirement system is to receive contributions each fiscal year which, as a percentage of member payroll are designed to remain level from year to year and are sufficient to (i) fund the actuarial cost allocated to the current year by the actuarial cost method, and (ii) fund unfunded actuarial costs to prior years by the actuarial cost method as follows:

a. Over not more than 35 years for amounts existing December 1, 1982.
b. Over not more than 25 years for amounts arising from benefit changes effective after November 30, 1982.
c. Over not more than 15 years for amounts arising from experience losses or gains during retirement fiscal years ending after November 30, 1981.

(2) Contribution requirements for defined benefits shall be determined by an annual actuarial valuation; provided that the contribution requirement may be reduced or eliminated for a fiscal year pursuant to the procedures in Section 141-32. The actuarial cost method shall be one which produces a contribution requirement not less than the contribution requirement produced by the individual entry-age normal cost method.

* * *

(b) *Certification of contribution requirement.* The retirement commission shall certify to the county executive the amount of the annual contribution needed to meet the financial objective.

Under the Michigan Constitution and the County's Ordinance provisions, the County has a duty to appropriate and pay annually the contributions to the Retirement System that the Retirement Commission has determined are required, after the Retirement Commission consults with the Retirement System's actuary and reviews the annual actuarial valuation each year. The County is in clear violation of its legal duty by failing to make its contribution to the Retirement System when it limited and modified the Inflation Equity Fund provisions and then declared those Inflation Equity Fund assets as the County's contribution to the Retirement System.

The Michigan Constitution and PERSIA set forth the County's minimum obligation to contribute to the Retirement System. Article IX, Section 24; PERSIA, MCL 38.1132 et seq.. The County has a clear constitutional duty to appropriate for and pay such required Retirement System contributions and to take no action that would "diminish or impair" accrued benefits of its active employees and the retired participants and beneficiaries of the Retirement System. The County's duty to appropriate for and pay required contributions into the Retirement System under the Michigan Constitution, PERSIA, and the Retirement Ordinance provisions do not involve the exercise of discretion or judgment.

The County's refusal to appropriate for and make required contributions to the Retirement System threatens the solvency of the Retirement System and thereby diminishes and impairs the rights and benefits of the County's active employees, retirees, and beneficiaries. By refusing to make required contributions, the County has reneged on its basic and vital promise of consideration given to the active and retired County employees in exchange for their dedicated service, and has instead misappropriated trust assets as its own attempted financial bailout.

SUMMARY AND RELIEF

MAPERS asserts that the autonomy of a public employee retirement system must be protected to ensure that all participants and beneficiaries receive those pension benefits to which they are entitled. An employer shall not be permitted to usurp authority and control of a retirement system or a retirement system's assets, or to make decisions that are properly vested with a retirement board of trustees. As the State, counties, cities, townships, and other units of government increasingly face budget crises, and as unfunded pension obligations become due, governing bodies of municipalities will increasingly seek to make changes in public pension plans attempting to address these serious fiscal concerns. The State Constitution, state statutes, and decisions of numerous courts within Michigan and outside Michigan have foreseen such circumstances and have firmly and consistently protected the autonomy of retirement systems and their assets; and required their proper funding by the sponsoring municipality.

The Retirement Commission of the Wayne County Employees' Retirement System, pursuant to Section 141-35 of the Ordinance, is vested with the authority for the administration, management and operation of the Plan. The Retirement Commission, pursuant to applicable federal and state law, is an autonomous entity and has a fiduciary responsibility to administer the Retirement System consistent with Plan provisions and shall discharge its fiduciary duties solely in the interest of the participants and beneficiaries; not the County. The Retirement System and the County are mutually exclusive entities with separate and distinct responsibilities and are created by and governed under separate authority.

As a qualified plan and trust under applicable federal and state law, the provisions which govern the administration of the trust are those provisions specifically contained and/or referenced in the Retirement Ordinance, applicable collective bargaining provisions, and applicable state and federal law. The County's position and its failure to pay the required ARC are contrary to the Michigan Constitution (Article IX, Section 24); State Statutes (PERSIA and PERA); the County Charter; Retirement Ordinance; Internal Revenue Code; as well as general trust law and common practice in the State of Michigan.

MAPERS, in recognition of a retirement board's fundamental duty to exercise fiscal responsibility and prudence, especially when making decisions which are certain to have a profound effect members and beneficiaries, respectfully requests that this Honorable Court issue an opinion which is in favor of the Plaintiffs-Counterdefendants-Appellees and which upholds the authority of the Retirement Commission of the Wayne County Employees' Retirement System.

Respectfully submitted,

VANOVERBEKE, MICHAUD & TIMMONY, P.C.

By: ______________________________
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Dated: August 11, 2014

PROOF OF SERVICE

The undersigned hereby certifies that on the 11th day of August, 2014, a copy of this *Brief of* <u>*Amicus Curiae*</u> *Michigan Association of Public Employee Retirement Systems* along with a copy of this *Proof of Service* was served upon Plaintiffs-Counterdefendants-Appellees' counsel of record and Defendant-Counterplaintiff-Appellant's counsel of record at the addresses indicated above via first-class mail, postage prepaid. I declare under penalty of perjury that the foregoing statement is true to the best of my knowledge, information, and belief.

____
Francis E. Judd

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY,
Respondent-Public Employer,

-and-

Case No. C10 J-266
Docket 10-000060-MERC

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
Charging Party-Labor Organization.
____/

Bruce Campbell, Wayne County Corporation Counsel &
Clifford Hammond and Timothy Schramm, Nemeth Burwell, PC, for Respondent

Keith Flynn, Miller Cohen, PC, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201, *et seq,* this case was assigned to Doyle O'Connor, Administrative Law Judge with the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge and Proceedings:

The original Charge in this long-running dispute was filed in January of 2010, by Michigan AFSCME Council 25 (the Union), alleging that Wayne County (the Employer) violated the Act by, in the midst of the bargaining process, unilaterally imposing a reduction in the length of the normal work week from five days per week to four days, with a corresponding reduction in pay, and by repudiating the pre-existing normal layoff and recall-by-seniority mechanisms. (Case No. C10 A-024). This change was referred to by the Employer as "Friday furloughs", which were imposed on a significant portion of the AFSCME-represented employees. The unilateral "Friday furloughs" were described by the Employer as intended to accomplish the Employer's earlier stated goal of securing a 10% reduction in its labor costs.

The facts underlying the original Charge, and much of the ensuing disputes, as well as the proffered Employer defenses, were all a nearly identical replay of a prior dispute between these very same parties, under indistinguishable circumstances, involving unilateral efforts by the Employer to reduce wages or benefits during an economic downturn, which was addressed, and resolved adverse to the Employer, in *Wayne County*, 1984 MERC Lab Op 1142; aff'd, 152 Mich App 87 (1986). Despite, or perhaps because of, the fact that the earlier *Wayne County, supra,* decision was both *res judicata* as to these parties and is regardless the controlling law on the questions presented herein, this litigation has been extraordinarily protracted, convoluted, and bitter. There were additional claims addressed in parallel cases both before me and before other ALJs, in which Wayne County was uniformly found to have repeatedly acted unlawfully and which will be addressed below.

The present Charge, as more fully discussed below, was originally filed as an amendment to the original Charge, but the allegations were severed and given a new case number. The present Charge arose from a pension ordinance amendment proposed by the County Executive and adopted by the County Commission, which is the County's legislative branch, in September of 2010. The Charge is brought on behalf of three separate AFSCME bargaining units which, as more fully discussed below, present partially differing claims: the supervisory unit; the sergeants and lieutenants unit; and the non-supervisory unit. The new pension ordinance mandated a significant reduction in pension benefits, provided by the County Pension Board through the Inflation Equity Fund, for those already retired and for those who would retire in the future, and it shifted significant resources away from negotiated employee deferred compensation and to the Employer's coffers. The matter was tried over three days, with approximately 9,000 pages of exhibits introduced[1], and with the Employer resting without putting on any testimony following the close of the Union's case in chief.[2] Both parties filed timely post-hearing briefs and then both parties filed supplemental briefs on narrow questions related to the potential impact of several subsequently decided appellate cases.

In February 2010, I issued a decision in favor of the Union on the original Charge, Case No. C10 A-024, related to the "Friday furloughs" and recommended an order directing the Employer to restore the

[1] Counsel, in particular for the Employer, acknowledged on the record that nearly the entirety of the 9,000 pages of exhibits was irrelevant. Indeed, in their post hearing briefs, the parties referenced a mere handful of the voluminous exhibits.

[2] The Employer rested without putting on a single witness despite repeatedly, and vaguely, insisting that there existed genuine disputes of material fact warranting an extensive evidentiary hearing on what objectively appeared to be, and ultimately was, a *factually* undisputed disagreement regarding the legal obligations of the parties.

workweek, cease the unilateral imposition of changes in conditions of employment, and compensate the directly affected employees. In sum, in the earlier Decision, I found the Employer's conduct, and its proffered defenses, legally and factually indistinguishable from the conduct of the same Employer in unilaterally imposing such Friday furloughs during bargaining, as to the same workforce, which had been held unlawful in 1984. See, *Wayne County*, 1984 MERC Lab Op 1142. I severed the remaining claims so that the County could immediately pursue exceptions with MERC, in the ultimately vain hope that clarity regarding the respective obligations of the parties would foster compliance. That recommended decision on summary disposition and the recommended relief were adopted by the Commission in March 2011. See, *Wayne County*, 24 MPER 25 (2011). The litigation continued unabated.

The Amended Charges

As events and acrimony between the parties progressed, the Charge was repeatedly amended. A Second Amended Charge added the allegation that the Employer had, in February 2010, made improper late-stage and retaliatory bargaining demands focused on the Employer's effort to alter the length of the work week. The Third Amended Charge asserted that the Employer had, following the decision holding the Friday furloughs unlawful, announced in May 2010 that it would regardless recoup a similar cost savings by unilaterally imposing "Holiday furloughs" on many unit employees. These "Holiday furloughs" as announced would take away the pre-existing paid holidays for Memorial Day, the 4th of July, and Labor Day, and additionally convert those former short holiday weeks into essentially week-long unpaid layoffs for much of the bargaining unit. Like the earlier "Friday furloughs", the new "Holiday furloughs" were imposed irrespective of the pre-existing contractual obligation to layoff and recall by seniority.

The announced "Holiday furloughs" were forestalled when the negotiators for the parties reached a tentative agreement on a successor collective bargaining agreement. That tentative agreement was not ratified, thereby returning the parties to the obligation to continue negotiations. The Fourth Amended Charge added claims related to the re-instituted "Holiday furloughs" which were, because of the passage of time, applied only to the July 4th and Labor Day holiday weeks. This time, the Employer added the more draconian threat to additionally deprive all employees subject to the holiday furloughs of health insurance coverage for themselves and their families for the entire months of July and September. The health insurance cut-off was premised on the fact that the Employer chose to schedule the "Holiday furloughs" to begin prior to the first day of the month, with the apparent sole purpose of the scheduling being to facilitate the Employer's unprecedented claim that it need not provide health insurance to the families of any employee not on the payroll on the first day of the month. The "holiday furloughs" dispute was addressed, a violation found, and remedies recommended, in a decision issued in November 2012, in Case No. C10 A-024-A.

A Fifth Amended Charge was filed, addressing several disputes, including over the County's unilateral decision, in September of 2010 to severely curtail, if not entirely eliminate, the disbursal of so-called "13th checks" to current and future retired employees. That dispute was not resolved in the earlier Decision on the original Charge, and by concurrence of the parties, it was spun off as a separate case under Case No. C10 J-266 and, at the behest of the parties, was held in abeyance for a protracted period.[3]

On September 17, 2010, the MERC appointed fact-finder issued his report based on extensive proofs by both parties focused on the Employer's financial status and ability to pay. He recommended that employees accept a 5% pay cut while largely recommending the maintenance of other existing conditions of employment. The fact-finding process is a statutorily mandated system designed to attempt to narrow the differences between parties with the goal of facilitating voluntary resolution of labor disputes. Either side was free to accept or reject the fact-finder's recommendation. Here, the Union accepted the recommended 5% pay cut; however, the Employer rejected that recommendation.

On September 30, 2010, the County Commission adopted an ordinance which purported to change the existing scheme of benefits promised to current and former retirees, in particular those benefits which had previously been disbursed through what was known as the "Inflation Equity Fund" (the IEF). As more fully discussed below, the new ordinance, which was then unilaterally implemented by the County, functioned to immediately transfer significant assets from the pension plan, amounting to approximately $32 million, for the benefit of the Employer. It thereby effectively precluded the disbursal by the pension board of previously negotiated benefits which had been promised to current and future retirees. The ordinance set in place new rules which in essence gutted the negotiated deferred compensation plan.

[3] Also addressed in the Fifth Amended Charge was the County's attempted implementation of the cut-off of family insurance coverage, including a retroactive cut-off of coverage for the month of September 2010. In a collateral action in Wayne County Circuit Court, an injunction was issued largely blocking the insurance cut-off, although a claim for related relief remained, which was addressed and a remedy ordered in the November 2012 decision in Case NO C10 A-024-A.

Subsequent to the fact-finding process, the parties continued to meet, as is required by law. In December 2010, the Employer asserted the existence of an impasse in bargaining and announced further unilateral changes in conditions of employment. A Sixth Amended Charge asserted that the new unilateral changes were unlawful as the parties were not at a good faith impasse and that the changes imposed went beyond the proposals made by the Employer at the bargaining table. The Union challenged a 20% base pay cut and a claimed new right of the Employer to sub-contract unit work without limitation. Also, in December of 2010, the County asserted the right to unilaterally dispense with the prior commitment to a 40-hour work week, thereby, in essence retroactively excusing its previously litigated unilateral changes in the work week. The 20% pay cut dispute was likewise addressed, a violation found, and remedies recommended, in the decision issued in November 2012 in Case No. C10 A-024-A.

In summary, the Union's multiple amended Charges alleged that the Employer had failed to bargain in good faith throughout, contrary to its obligations under Section 10(1)(e) of PERA; that the unilateral implementation of the myriad changes in conditions of employment were separate violations of the Section 10(1)(e) duty to bargain; and that certain imposed changes were retaliatory and thereby contrary to Section 10(1)(a) of the Act.

As more fully discussed in the November 2012 decision, the Employer asserted that the unilateral substantive changes in conditions of employment were somehow within its ordinary management rights. The County further asserted that its demands for economic concessions, and unilateral implementation of those demands, were warranted by economic exigencies. Additionally, the County asserted that the decisions by its Executive branch on how to implement the County Commission's legislative determination to cut budgeted gross salary costs were unreviewable under PERA. Although that claim of immunity from review was earlier rejected, it was re-asserted as the main defense in the present case regarding the County Commission's legislative decision to raid the IEF, albeit at the behest of the County Executive, to eliminate an existing negotiated deferred compensation benefit.

The Collateral Unfair Labor Practice Charges

During the pendency of this case, the parties litigated multiple other claims, arising from differing factual scenarios, both before me and before each of the other MAHS ALJs assigned to hear disputes under PERA. As will be more fully addressed below, it was established in each of the multiple cases that during the same round of bargaining, that Wayne County acted unlawfully including by: refusing to provide requested information; withholding health care benefits from disabled employees in 2009; withholding a scheduled pay increase in July 2009; withholding a separate scheduled pay increase in July 2010[4]; and of course, unilaterally imposing the Friday and later holiday furloughs in 2010. The County was additionally found to have brought a meritless ULP Charge against the Union in an improper effort to block a collateral contract enforcement action in the Wayne County Circuit Court.

Findings of Fact:

The Background Facts[5]

Despite the protracted and acrimonious litigation over this multi-faceted dispute, the core facts were not legitimately in dispute. In truth, the dispute was factually straightforward. Like many, if not most, public employers these days, Wayne County is indisputably suffering from a decrease in tax revenues owing to both the economic downturn and tax policies. Unlike most public employers, Wayne County chose to repeatedly engage in self-help in the form of unilateral changes to well established conditions of employment as a way of attempting to address its own prior, and ongoing, budgetary and policy choices. While the Union challenged many of those unilateral Employer efforts at self-help as having been unlawful, it refrained from engaging in the corollary self-help of a work stoppage, presumably based at least in part on the fact that the PERA hearing process was designed to provide remedies in lieu of such disruptive self-help. The obligations and remedies under PERA were carefully calibrated for the very purpose of avoiding the tit-for-tat resort to self-help that would occur in an unregulated environment.

The parties' collective bargaining relationship goes back many decades. The most recent contracts expired and the disputes addressed in this, and in the many collateral decisions, arise from the Union's challenges to certain unilateral actions taken by the Employer during the bargaining process to secure a successor agreement.

In June 2009, the Employer withheld contractually mandated 2% pay increases owed to certain employees, called annual service adjustments, which was held on summary disposition to be unlawful by ALJ Peltz in April 2010 and later affirmed by the Commission. See, *Wayne County*, 24 MPER 12 (2011).

[4] That matter was not litigated to conclusion, as more fully described below.
[5] The background facts are derived from the record in this matter and from prior formal decisions by MERC and by the several ALJs who have heard various portions of this dispute.

In September 2009, formal fact-finding proceedings were initiated with MERC. Such proceedings are a creature of statute and are a part of the bargaining process. Fact-finding is a mechanism designed to assist parties in fulfilling their mutual obligations to bargain in good faith, and those proceedings are intended to deter disruptions of public services as a result of unresolved labor disputes. The parties were each well aware that it is unlawful for an employer to make unilateral changes in conditions of employment during the pendency of such fact-finding proceedings, as was first established in *Wayne County (AFSCME)*, 1984 MERC Lab Op 1142; *aff'd*, 152 Mich App 87 (1986).

In October 2009, the County acted to withhold health care benefits from certain disabled County employees. That conduct resulted in another finding by ALJ Peltz in 2011 that the County had acted unlawfully in unilaterally changing employment conditions during bargaining, which was most recently affirmed by the Commission in *Wayne County*, 26 MPER 22 (2012).[6]

As bargaining continued, in January 2010, the County unilaterally imposed the unlawful "Friday furloughs" on much of the AFSCME unit. The ALJ's Recommended Decision and Order on summary disposition regarding the Friday furloughs was issued in February 2010. Later in February 2010, the County interjected, late in the bargaining process, demands essentially designed to eliminate the contractual work week obligations which had previously been freely entered into and which had been the focus of the findings of unlawful conduct by the County regarding both the 1983 and the 2010 "Friday furloughs".

In May 2010, the County announced its intent to unilaterally impose "Holiday furloughs" that were expressly designed to make up for the lost financial concessions the County had sought to unilaterally impose through the unlawful "Friday furloughs". Also in May 2010, the negotiators for the parties reached a tentative agreement (TA) on a new collective bargaining agreement. After the TA was rejected, the County renewed its announced intent to impose "Holiday furloughs" with the additional announced intent to add to the layoffs a cut-off of health insurance for the entire month for any employee, and their family, who were directly impacted by the "Holiday furloughs". The threatened health insurance cutoff was unprecedented, having not occurred in either the 1983 or 2010 unilateral "Friday furloughs". The Employer human resources and labor relations staff witnesses each denied being the one

[6] Notably, in his Decision on the health insurance case, ALJ Peltz recommended an award of attorneys fees against the County premised on an established and egregious pattern of repeated willful violations of their bargaining obligations and of the Act. The Commission affirmed the finding of unlawful conduct, but rejected the proposed award of fees.

who actually made the decision to implement the draconian health insurance cutoff.

In June 2010, the County carried through with its announced intent and laid off a significant portion of the workforce, approximately 560 employees out of the unit of approximately 1500 workers, beginning the week before the 4th of July holiday week. The change in layoff date was designed to have the effected employees off the payroll on the first day of the month in order to bolster the County's claimed entitlement to cut such employees off from health insurance for the entire month. The manipulation of the layoff dates to support the cutoff of health insurance was itself unprecedented. The purpose and function of the enhanced "Holiday furloughs", with health insurance cutoff, was to punitively increase the cost to the AFSCME unit members of having rejected the concessions in the May tentative agreement.

As with the 1983 and 2010 "Friday furloughs", the County ignored the long existent agreement, which it had repeatedly renewed even after losing the 1983 litigation, to use the common method of laying off the least senior employees in order of seniority. Instead the County unilaterally changed to a method it asserted was designed to "spread the pain" by laying off a large section of the workforce for several brief periods. Only the AFSCME non-supervisory unit among the County's multiple bargaining units, faced the "Holiday layoffs" and the County witnesses, including its director of human resources Tim Taylor and its chief negotiator Mark Dukes, acknowledged that the laying off of the members of one bargaining unit, while no other County employees were laid off, through such "Friday furloughs" or "Holiday furloughs", was an unprecedented move.

Also in June 2010, the County again unilaterally withheld a 2% pay increase owed certain employees, despite the fact that ALJ Peltz had held in April of 2010 that the indistinguishable 2009 unilateral refusal by the County to pay a scheduled pay increase was unlawful.[7] Even though the parties were then actively engaged in bargaining and in the fact-finding process, the County would later implausibly defend the June 2010 withholding of a scheduled pay increase based on its assertion that

[7] As a part of the December 2011 contract settlement, the County withdrew its challenge in the Michigan Court of Appeals to the Commission Decision reported at *Wayne County*, 24 MPER 12 (2011), adopting Peltz' finding that the 2009 withholding of a pay increase was unlawful. The parties had already briefed before me on summary disposition the question of the legality of the 2010 unilaterally withheld pay increase, with the County conceding that the 2009 and 2010 cases were indistinguishable. As part of the 2011 settlement, the Union withdrew the ULP then awaiting decision on the 2010 withheld 2% pay increase, the outcome of which was otherwise seemingly inevitable given the Commission's already published Decision affirming Peltz with regard to the 2009 pay increase.

the parties *subsequently* reached an impasse in bargaining in December of 2010.

In August 2010, the County unilaterally imposed on a large portion of the workforce a "Holiday furlough", with that layoff of approximately 520 employees timed to precede the Labor Day holiday to again bolster the County's claimed right to withhold health insurance from the affected workers and their families for the month of September. In a particularly perverse and punitive twist, the County laid off workers whose jobs were fully funded by grants from other entities, even if that meant returning grant funds as unspent. The layoff of grant funded employees was evidence that the layoffs in general were punitive rather than driven by budget exigencies, as those layoffs brought no benefit whatsoever to the County's general fund.

On September 17, 2010, the MERC appointed neutral fact-finder Paul E. Glendon issued his report on the bargaining issues facing the parties.[8] Glendon's report recommended a 5% employee pay cut, while for the most part leaving in place the remainder of the status quo of the parties' relationship. The Union accepted the fact-finder's recommended financial package, including the 5% across the board pay cut, which the County rejected. Also in September, the County announced that it intended to retroactively cut off family health insurance coverage for many of the unit employees. A circuit court injunction sought by the Union blocked the threatened health insurance cutoff and the Union and the Employer later entered into a process by which most, if not all, employee health care claims were reimbursed. In the factfinding hearings, the formal proposal by the County was to exclude all new hires, and only new hires, from the provisions of the Inflation Equity Fund. Instead of utilizing the fact-finders report as an opportunity to re-examine its prior bargaining posture and to return to the table with the Union, the County treated the entire fact-finding process as a mere inconvenient hurdle to be gotten past en route to its intended unilateral implementation of changes to conditions of employment.

The Dispute Over the Inflation Equity Fund

On September 30, 2010, only two weeks after the issuance of the fact-finder's Report, and during the minimum 60-day post-factfinding mandatory negotiation period, and before any substantive bargaining could have taken place in response to the fact-finder's recommendations,

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[8] As addressed more fully in the Discussion section below, once a MERC fact-finder's report is issued the parties are expected, indeed required, to re-double their bargaining efforts for at minimum another 60 days during which period unilateral action on a mandatory subject of bargaining by either side is *per se* unlawful.

the County Commission took up a pension ordinance amendment which had earlier been proposed by County Executive Robert Ficano in June of 2010 and introduced by a County Commissioner in August 2010. The ordinance, which was passed and immediately put into effect, had a fundamental impact on pre-existing conditions of employment. It is undisputed that the unilateral implementation of the new ordinance began with the transfer of approximately $32 million to the Employer from funds intended for distribution as part of employee deferred compensation. The new ordinance specifically took away from the otherwise independent pension board authority to maintain more than $12 million dollars in the long existent "Inflation Equity Fund" (the IEF); prohibited disbursals of more than $5 million per year from the IEF; and allowed the Employer to take for its own benefit the approximately $32 million then in the IEF in excess of the newly imposed cap of $12 million. This huge transfer of value from employee compensation and for the Employer's benefit had not been negotiated and occurred despite, as to the non-supervisory unit, the fact that the parties were still in negotiations; still in the fact-finding process; and despite the fact that even the Employer would not assert that the parties were at impasse in bargaining until months later. The ordinance change was also applied as to the supervisory unit and the sergeants and lieutenants unit even though they had valid collective bargaining agreements in place at the time.

The facts regarding the origin of the IEF were never genuinely placed in dispute. Under the pre-existing County Charter, and pursuant to the collective bargaining agreements, there existed an independent pension board, comprised of eight members. Six members represent beneficiary interests, four of whom were elected from amongst active employees, with two elected from retired employees. The County Executive and the chair of the County Commission also sit on the pension board. Over the past several decades, the pension board implemented and administered such benefits as were negotiated for Union members or were granted by the Employer to non-Union employees. The new ordinance took effective authority over the now-substantially depleted IEF away from the pension board.

The principle witness regarding the IEF, and the history of the so-called 13th checks disbursed from the fund, was Ron Yee, who was peculiarly situated to have broad knowledge of the origins of the IEF, its historic handling, and the impact of the change. Yee was initially in the 1980s an AFSCME officer, was then on the AFSCME negotiation team, and was on the pension board as an elected trustee; Yee then switched to management, rising to be the County's Chief Labor Negotiator, later becoming Deputy Director and later still the Director of the Retirement System. Yee was intimately familiar with the handling of the issue, from all sides, over a more than 25 year period, ending with his retirement as director of the retirement system in 2010, just as the disputed ordinance change was being implemented. I fully credited Yee's testimony as it was forthright, very direct, and while extensively knowledgeable. Yee freely acknowledged when he did not know something, or was not sure of specifics, or the like.

Significantly, the County rested its proofs without putting on any testimonial or documentary evidence challenging the Yee testimony. Further, Yee's testimony was supported by the corollary and likewise credible testimony of Hugh MacDonald, a former AFSCME negotiator when the IEF was originally bargained, former director of accounting for the County responsible for monitoring the pension funds, and current retiree pension trustee; as well as by the testimony of Richard Johnson, who had negotiated on behalf of County employees in AFSCME throughout the relevant several decades.

Yee testified, without contradiction, that the IEF was an expressly negotiated contractual promise. Prior to 1984, the parties negotiated cost of living increases as a hedge against inflation for active and retired employees. The IEF was designed and agreed to in 1984 to replace the former, and more costly, system of issuing periodic cost-of-living (COLA) checks to retirees. The IEF was established to collect and hold assets and to annually disburse monies to eligible retirees in place of the former COLA checks, in a form which came to be known as the "13th Check". The specific contractual agreement was that the parties would mutually develop a set of language changes to the County pension to implement a new "immunization investment portfolio" to replace the COLA system. The contractual commitment was that the Employer would invest those funds "on behalf of employees". It took the parties several years of effort to finally devise the IEF, as the implementation of the agreed upon "immunization investment portfolio", and have an enabling ordinance amendment adopted. That resolution was particularly notable as it was a part of the settlement of the 1983-84 AFSCME-County disputes over the unilateral discontinuation of COLA pay for active employees, which was litigated to a conclusion adverse to the County.

The IEF was originally enabled via ordinance amendment in 1986 as a direct result of the 1984 collective bargaining agreement which committed the parties to devising an amendment to the pension ordinance to provide a different mechanism for inflation protection. The pension ordinance, and subsequent amendments, with the obvious exception of the disputed 2010 amendment, was a creature of the collective bargaining process. This fact was expressly acknowledged by the Employer when the ordinance was amended in 2000, regarding the IEF itself. The County Commission motion adopting the 2000 ordinance amendment specified that the amendments were adopted to *"add additional language as a result of new labor agreements"*. In this litigation the Employer argued, without any discernible evidence, that the County Commission was in fact mistaken in 2000 when it formally amended the pension ordinance to "add additional language as a result of new labor agreements". The Employer's theory was that the then new labor agreements did not have language in the actual contract documents reflective of the ordinance amendment. The reason for that, as established by the proofs, was that the parties routinely memorialized their pension agreements by the expedient of having the County Commission adopt mutually agreed upon ordinance changes, with the collective bargaining agreements containing language requiring compliance with the new pension ordinance. Additionally, in the several collective bargaining agreements over the years, the parties contractually committed themselves to the maintenance of the retirement benefits described in the then-existing pension ordinance, which they expressly agreed *"shall control except where amended or changed"* within the collective barging agreement.

Throughout the ensuing decades, the Pension Board continued by mutual agreement to be numerically dominated by elected employee and retiree representatives. The IEF was funded by so-called "excess earnings" above the anticipated or target rate of return set by the Pension Board. Each year, the Board applied a long standing set formula to divide actual returns on investments between the Investment Equity Fund (IEF) and the Active Employee Reserve. Monies diverted to the Active Employee Reserve had the effect of reducing the Employer's contributions the following year. Part of the monies placed in the IEF was used to fund that year's 13th check, and a portion might be held in reserve to fund payments in future years. The total disbursed each year was in the $10 million range, but the amount of funds available went up and down depending on the market; the precise amounts disbursed each year were subject to the discretion of the trustees. The reserves held in the IEF above current year needs were later used to fund the 13th check in down-market years.

The 2010 unilateral ordinance change put a new hard cap on the amount that the pension trustees could place, or hold, in the IEF. The implementation of that new cap defined the fund as being $32 million over-funded. Rather than disburse the funds to employees or retirees for whom it had been held in reserve, the $32 million was immediately transferred to the County's coffers pursuant to the new ordinance. As the County's former chief labor negotiator and director of the pension system Yee put it, the County *"robbed Peter to pay Paul"*. The annual disbursal for the benefit of employees dropped to the range of $1 million for 2010 from the former average of $10 million. After the unilateral transfer, the

IEF reserve fund had plummeted to approximately $3 million, which was a twenty-seven year low.

The availability of yearly IEF 13th Checks was expressly held out to active employees as a part of their contractually guaranteed deferred pay in exchange for their labor on behalf of the County, including at the bargaining table by Yee as the County's chief negotiator. The pre-existing County pension plan had no built in inflation escalator. The practice of the pension board up to 1984 had been to provide periodic but uncertain COLA payments to retirees, in what was a corollary to the periodic COLA payments received by employees. That methodology was expensive and uncertain as it depended on specific budget allocations by the County Commission. The parties agreed to the IEF methodology as a way of providing a hedge against inflation as part of employee benefits, while taking control of it away from the political process at the County Commission. The parties subsequently agreed to exclude employees hired after certain dates from receiving IEF checks. Even though the precise amount of the IEF checks was never guaranteed, but depended on the markets, by express agreement the precise amount was ultimately controlled by the employee-dominated Board of Trustees exercise of their discretion and by the existence of the IEF reserve funds. That market relationship is now gone, the Trustees discretion is gone, and the IEF reserves are gone as the Employer has raided the cookie jar.

The change effected several different bargaining units represented by AFSCME: the non-supervisory unit, which had an expired contract but was in the factfinding process at the time of the unilateral change; the supervisory unit which had a collective bargaining agreement in effect at the time of the change which expressly required compliance with the then existing pension ordinance unless altered through negotiations; and the sergeants and lieutenants unit which similarly was governed by an extant contract with the same mandate. Each contract explicitly referred to disbursals from the IEF and defined the class of individuals entitled to receive the annual benefit.

Following the pension ordinance change, and in December 2010, the Employer asserted that the parties were then at an impasse in bargaining. Even in the County's supposed last best and final offer, the County only proposed eliminating the IEF payments as to new hires. The Employer then unilaterally imposed a 20% pay cut on the AFSCME non-supervisory unit, including on that large segment of the workforce which had already undergone the partial "Friday furloughs" and the extended "Holiday furloughs", which together amounted to an approximate 12% cut in annual pay. County human resources director Tim Taylor acknowledged that no other bargaining unit was required to undergo both the layoff days and the full wage cut. The County, as part of its unilateral implementation of new employment terms, also purported to grant itself a new essentially unlimited right to subcontract that work performed by AFSCME members, even though it had agreed with other bargaining units to retain ordinary limited contractual restraints on the sub-contracting of existing unit work. Additionally, the County asserted that it was dispensing with the long extant contract language on the length of the workweek in an effort to *post hoc* ratify the earlier "Friday" and "Holiday" layoffs.

The parties did finally voluntarily settle on the terms of a new CBA for the non-supervisory unit in December of 2011. That contract maintained, without significant changes, the contract language sought by the Union regarding the length of work week and layoff obligations of which the County ran afoul in 1983 and again in the January 2010 events which begat this litigation. The new contract included a wage concession by the AFSCME unit, as sought by the Employer, but had the Employer issuing two lump sum payments of 2% each at six month intervals to compensate employees for the earlier withheld annual service adjustments. The new contract included the County's proposed exclusion of new hires from the benefits paid out of the IEF. The County proposed that the Union, as part of those negotiations, waive the claims in the present unfair labor practice charge. The Union rejected the proposed waiver, and the parties nonetheless settled the contract. That new contract, which runs until 2014, did not resolve the IEF issues including the $32 million transfer, which the parties reserved for resolution at MERC, and which are addressed herein.

<u>Discussion and Conclusions of Law</u>:

The case law under PERA is well settled that salary, the length of the workday or workweek, and benefits such as health insurance and pension entitlements are all mandatory subjects of bargaining, and that neither side may take unilateral action to alter existing practices regarding such mandatory subjects unless a good faith impasse in bargaining has occurred. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974); *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268 (1978); *International Association of Fire Fighters (IAFF) v Portage*, 134 Mich App 466 (1984).

There is a significant difference under the law in the analysis of the propriety of unilateral employer changes in conditions of employment before, and after, fulfilling the bargaining obligation. In essence, there is a presumption that any unilateral changes prior to the completion of the bargaining process have not been made in good faith. Once the bargaining process has been exhausted, and assuming good faith conduct throughout, the law recognizes both the right and the need for the employer to act decisively and, if necessary, unilaterally to define future conditions of employment. Determining whether a "good faith" impasse existed requires a review of the totality of the circumstances. *Warren Education Association*, 1977 MERC Lab Op 818. If a public employer takes unilateral action on a "mandatory subject" of bargaining before reaching a "good faith" impasse in negotiations, the employer has committed an unfair labor practice. *IAFF* v *Portage*, supra.

The Commission has further defined impasse as the point at which the parties' positions taken in good faith have so solidified that further bargaining would be futile. *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. The Employer bears the burden of establishing the existence of a "good faith" impasse and proving that neither party was willing to further compromise. *Oakland Comm College*, 2001 MERC Lab Op 273, citing *NLRB v Powell Electric Mfg. Co*, 906 F2d 1007 (CA 5 1990); *Huck Mfg Co. vs. NLRB*, 693 F2d 1176, 1186 (CA 5 1982). However, it is also well established that a good faith impasse will generally not be found where a party has not bargained in good faith, including where unremedied unfair labor practices have been committed by the party asserting the existence of an impasse. See, *Detroit Public Schools*, 25 MPER 77 (2012); *City of Warren*, 1988 MERC Lab Op 761. Unsurprisingly, an impasse resulting from one party's bad faith conduct does not relieve that party of the duty to bargain. *Warren*, supra at 767.

It is additionally well settled that an employer may not unilaterally impose changes in mandatory subjects of bargaining, such as salary and benefits, during the pendency of a fact-finding proceeding conducted by MERC pursuant to PERA. *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County (AFSCME)*, 1984 MERC Lab Op 1142. The purpose of the bar on the imposition of unilateral changes prior to the conclusion of fact-finding is that the process is designed, and mandated by statute, as a mechanism for the good faith and voluntary resolution of labor disputes. Only upon the exhaustion of settlement efforts, including fact-finding, and in the event of a resulting impasse in negotiations after good faith bargaining following the issuance of the fact-finders report, may one party appropriately assert that it has in "good faith" reached an impasse and then unilaterally impose changes in pre-existing conditions of employment. See, *AFSCME v Wayne County*, supra.

As the Court of Appeals held in affirming the Commission's *Wayne County* decision in 1986:

> The general principles of law governing an employer's right to implement changes in wages and other working conditions during the negotiation process are well established and have been set forth by this Court in *Local 1467, International Ass'n of Firefighters, AFL–CIO v. Portage,* 134 Mich App 466, 472–473 (1984):
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> * * *
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> Neither party may take unilateral action on a mandatory subject' of bargaining absent an impasse in negotiations. An employer taking unilateral action on a mandatory subject' of bargaining prior to impasse in negotiations has committed an unfair labor practice. MCL 423.210(1)(e); MSA 17.455(10)(1)(e). This prohibition against unilateral action prior to impasse serves to foster labor peace and must be liberally construed, particularly in light of the prohibition against striking by public employees set forth in MCL 423.202; MSA 17.455(2). (Citations and footnote omitted.) See also, *Ottawa County v. Jaklinski,* 423 Mich. 1, 12–13, 377 N.W.2d 668 (1985).

As the Commission held in *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, even a *bona fide* financial crisis does not justify an Employer's unilateral repudiation of its contractual obligations, where a contract is in place, or permit a unilateral change in conditions of employment. Repudiation of contractual obligations is found by the Commission where there is an existing contract, as with the non-supervisory unit here; the contract breach is substantial; the contract breach has a significant impact on the bargaining unit as a whole; and there is no *bona fide* dispute over the interpretation or applicability of the contract language involved. *St. Clair County Road Comm,* 1992 MERC Lab Op 316. The repudiation question is here relevant only to two of the three AFSCME units, which had existing contracts.

As noted in the November 2012 Decision, these parties were hardly without a history or guidance on the very question of what to do when an economic downturn hit. The early 1980s saw a significant economic downturn. These same parties, AFSCME & Wayne County, became embroiled then in an indistinguishable squabble over how to handle the resulting shortfall in revenue. The County unilaterally devised a scheme of changes to existing conditions of employment which it believed would allow the budget shortfall to be spread more evenly across all employees, with arguably little disruption of service. The County did it without the Union's concurrence and without exhausting its bargaining obligations.

The Commission held that the earlier reviewed conduct was unlawful; ordered it reversed; was affirmed in a published Court of Appeals decision; and the resulting rule became the black letter law by which not just these parties, but all public sector parties, understood their obligations in ensuing years.

Twenty-five years later, this same Employer, for unexplained, and seemingly inexplicable, reasons went back to the same playbook and unilaterally imposed cuts in an effort to "spread the pain" as it saw fit, rather than maintain the existing wage and benefit package mandated by the collective bargaining agreements the County had continued to negotiate and sign in the interim. As was inevitable, in 2011 the Commission held the replay of the County's unilateral budget balancing actions to have been as unlawful as were the 1980s original. *Wayne County*, 25 MPER 24 (2011).

As held regarding the "Friday & Holiday furloughs", the County had the absolute right to reduce its spending to meet its budget limitations; indeed, it had the duty to do so and it had readily available and contractually agreed upon mechanisms for doing so. What it did not have the right to do was unilaterally change the rules in the midst of the latest, unpredictable but nonetheless inevitable, downturn. The County was likewise not entitled to unilaterally impose wage and benefit cuts to avoid reducing services and to instead force employees to bear the brunt of the County's profligate spending.

The function of PERA is not to set the terms of the employment deal struck between employees and their employers. PERA functions to regulate the means to reach such deals and to enforce good faith compliance with voluntarily agreed upon arrangements. One purpose of such enforcement is to facilitate the reaching of future agreements. A necessary predicate for successful future negotiations is that the parties are cognizant that they are each legally entitled to expect, and compel, compliance by the other with the terms mutually agreed upon. See, *Kalamazoo County & Sheriff*, 24 MPER 17 (2011).

Here, as in the 1980s, the County agreed to a perfectly ordinary set of contractual obligations which left it with the unfettered right to match the workforce, and the services to be provided, to the quantity of funds available or allocated. The County contractually bound itself to the creation of a reserve fund to make payments as part of deferred compensation; contractually bound itself to a particular mechanism by which the funds would be disbursed; and contractually bound itself to maintain those funds for the benefit of employees. The County failed at its obligation to manage its affairs. Instead, perhaps understandably, the County's leadership wanted to have it all---a full size workforce with all the programs for the public intact, with a less than full-sized budget. The resort by the County to self-help in seizing the funds, which it had explicitly agreed to set aside for the benefit of employees, was unlawful.

It has now become a convenient public relations gambit to assert that such 13th checks, and the establishment of dedicated funding streams to provide such deferred compensation benefits, amounted to a gift, a gratuity, or a bonus. They are not.[9] The 13th check system is utilized by many employers, in addition to Wayne County, as a method of giving some rough protection against inflation in deferred compensation systems. In the 1970s, it was not unusual to have formal inflation hedges in such systems tied directly to the cost of living indicators (COLA). That system became perceived as both unpredictable and prohibitively expensive by the late 1970s-early 1980s. In Wayne County in particular, the Employer's effort to get out from under the admittedly burdensome COLA increases lead directly to unilateral action by the County and to the 1984 and 1985 adverse Commission decisions. For Wayne County, as established by testimony in the present case, the COLA system was replaced by the 13th check system which created a dedicated funding stream to provide an annual bump which, while guaranteed to be paid, was not guaranteed to actually match the rate of inflation. It might be higher than a traditional COLA payment; it would likely be lower; but the annual receipt was assured.

The focus on the elimination or curtailment of promised deferred compensation payments has its genesis in the present difficult fiscal circumstances, and also in a specifically Machiavellian pressure. Those who have already retired or who are about to retire have the least bargaining power of the several constituencies whose needs compete for limited resources. Office holders rightly seek to satisfy the demand of constituents for maintained services, even with reduced tax revenues. Employers see value in placating those on whose labor they must depend in the coming months or years to provide those services to the public. It is that very recognition of the value of labor peace that underpins the obligations set by PERA. There is, however, little immediate perceived

[9] The reference to retirement obligations for public employees as "gratuities" is not without historical precedent in Michigan, *albeit* not supportive of the assertion. In *Bowler v Nagel*, 228 Mich 434 (1924), the Court specifically rejected the City of Detroit's assertion that amounts paid from retirement funds were "gratuities". However, in *Brown v Highland Park*, 320 Mich 108 (1948), the Court faced a financially beleaguered city and held that, despite *Bowler*, such pension obligations were not individually enforceable "contractual" obligations in nature, such that the City of Highland Park could eliminate the pensions of the widows of police and firemen, by the expedient of a Charter amendment, without offending State law or the Federal Constitutional impairment of contracts clause. Outrage over the impact of that decision helped lead to the 1963 Constitution, which in article 9, section 24, put the theory to rest and defined such public pension benefits as Constitutionally protected entitlements. The same Constitutional Convention adopted article 4, section 48, which authorized the creation of PERA, the unionization of public employees, and the negotiation of enforceable collective bargaining agreements.

value in maintaining peace with those whose labor is no longer of significance.

Additionally at play is a strong dose of willful forgetfulness. Public officials, and the public they serve, see little value in cutting a pay check to someone who did not perform labor last week or last month and whose services are not needed next month. The simple fact, however, is that the retirees, and those to retire in the future, worked in exchange for a specific wage and benefit package which included pensions and the 13th check inflation protection. The monies were earned and they are owed; yet, snatching the payments away currently plays well to the public as 'sound fiscal management' or a 'fair sharing of the pain'.

One only need posit the potential corollary to recognize the unfairness and unreasonableness of the claw-back of payment for labor already provided. The County's actions in repatriating this wealth are, in practical reality, no different than if they showed up at the homes of former employees to announce "*We have decided that 2 years ago (or 10 years ago, or 20) we paid you at an agreed upon hourly rate that we now think was too high. Therefore, we have repossessed your car & we took your kids bikes out of the garage and we are selling them to get our money back.*" The populace would be rightfully up in arms at such an affront.

No public official, or fiscal analyst, proposing such schemes of retroactive withdrawals of promised deferred compensation have themselves taken, or offered to take, retroactive pay cuts for their services in prior years (which in many cases arguably are what led to the present fiscal crisis). No one expects current elected officials to give back some percentage of their prior years' pay, but it nonetheless seems reasonable to demand it of retired or soon to retire employees.

Of course the above analysis is unnecessary when good faith bargaining occurs and addresses a fiscal downturn responsibly. Here, after all the drama and all the litigation losses, the County and the Union were finally able to negotiate a new collective bargaining agreement. It restored most of the conditions of employment that had been unlawfully changed. The Union agreed to a wage cut for future work performed. Significantly, the Union agreed that the 13th Check promise would be withheld from new hires. And that is a proper handling of the question. Employees are entitled to know under what package of remuneration they are being asked to give their labor. For an employer to say to employees '*After today, we can no longer pay as much as we did in the past*' may be an unwelcome occurrence; however, it properly allows employees to choose freely to work for the lower wages or to seek employment elsewhere. Just as employees cannot rightly demand more than has been promised, an employer cannot, after the labor has been performed, pay less than was promised.

As to both the supervisory unit and the sergeant and lieutenants units, unexpired collective bargaining agreements were in place at the point in September 2010 when the County unilaterally altered the IEF and snatched $32 million dollars that had been set aside for employee deferred compensation. That resort to self-help was an unarguable repudiation of the Employer's contractual commitments to those two bargaining units. No viable defense has been proffered, much less proved. In the absence of a an even colorable claim to having a good faith dispute as to the meaning of the contractual commitments, such a refusal to comply is a repudiation of the agreements and an unfair labor practice, as it violates the duty to bargain in good faith under section 10(1)(e) of PERA. See, *St. Clair Rd Comm*, supra.

A different analysis applies to the non-supervisory AFSCME bargaining unit, where the prior collective bargaining agreement had expired. While an employer is certainly able, under appropriate circumstances, to unilaterally change conditions of employment after expiration of a collective bargaining agreement and upon exhausting its bargaining obligations, that has not occurred here. At the time the disputed changes were imposed, the parties were in the late stages of a formal fact-finding process under PERA. The purpose of fact-finding is to aid parties in reaching a voluntary and good faith resolution of a pending contractual dispute. For either side to take unilateral action on a fundamental aspect of their relationship is inherently destructive to the bargaining relationship and of the fact-finding process, which is an extension of the statutory bargaining process. Such unilateral action during fact-finding has long been held to be unlawful. Indeed, the seminal case on the question involved this same employer and this very same tactic of unilaterally imposing pay and benefit cuts during the pendency of a fact-finding proceeding. *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County*, 1984 MERC Lab Op 1142. The County's action in imposing the benefit cuts followed shortly on the heels of the fact-finders September 2010 report and without any pretense at engaging in a renewed effort to bargain based on the recommendations made by the fact-finder.

In *Orion Twp*, 18 MPER 72 (2005) the Commission most recently reiterated the obligations faced by parties after the issuance of a fact-finders report, holding:

> We have consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA. *Crestwood Sch Dist*, 1975 MERC

> Lab Op 609; *Cass Co Road Comm*, 1984 MERC Lab Op 306. In the *Wayne Co* case, [*Wayne Co*, 1984 MERC Lab Op 1142, and 1985 MERC Lab Op 244, 250, aff'd 152 Mich App 87, 125 LRRM 2588 (1986), lv den 426 Mich 875 (1986)] we established a rule that parties must bargain for a reasonable time over the substance of a fact finder's report. We stated that in most cases, a reasonable time is 60 days after the issuance of the report, providing the parties are bargaining in good faith. We have found that after fact finding, a party must make a serious effort to reconcile its differences with the other side; simply meeting and discussing the fact finder's report may not be sufficient to satisfy the bargaining obligation. *Oakland Cmty College*, 2001 MERC Lab Op 273; *City of Dearborn*, 1972 MERC Lab Op 749, 759.

As to the non-supervisory units, the County had not exhausted its bargaining obligations prior to enacting the pension ordinance change and materially altering previously promised portions of the wage and benefit package. The County's actions amounted of a forthright raid on an investment fund which the County had contractually agreed it would maintain for the benefit of employees. The Commission has rightly recognized the entirely corrosive, if not fatal, effect such self-help maneuvers have on the statutorily mandated bargaining process. See, *Kalamazoo County & Sheriff*, 24 MPER 17 (2011). If in the middle of bargaining, either side is allowed to unilaterally grab what it can grab, the prospects dim for the mutual give and take necessary to reach a voluntary resolution. That unilateral change in conditions of employment as to the non-supervisory unit, in particular the seizure of the $32 million dollar fund, during the bargaining process and in the late stages of the factfinding process, was an unfair labor practice under section 10(1)(e) of PERA.

Further, and again only as to the non-supervisory unit that had an expired contract, even assuming *arguendo* that good faith bargaining had occurred over a successor agreement and that an impasse had, contrary to the prior Decision, existed in either October or December 2010 between the County and the Union as to the non-supervisory unit, the changes would still be unlawful. Under PERA, when parties have exhausted the bargaining process, including fact-finding, and are at a good faith impasse, the Employer is privileged to unilaterally implement changes in conditions of employment consistent with the Employer's final offer. *Ottawa Co v Jaklinski*, 423 Mich 1 (1985); *Detroit Police Officers Ass'n v. Detroit*, 391 Mich 44, 54-55 (1974).

Here, the Employer's formal final offer in the factfinding proceeding as to the non-supervisory unit was that the IEF payments would be made only to existing employees or then-retired employees and would be denied to all new hires. What the Employer implemented was far more draconian than its final offer. Instead of merely closing the door to future accruals of the benefit, the Employer engineered an ordinance change which it utilized to drain the investment fund from which payments to both current employees and future hires would have been drawn. That change was of course not consistent with what had been proposed at the table by the Employer and, consequently, the Employer's over-reaching conduct would have been unlawful even if the parties had been at a good faith impasse.

I have above found that the County's actions were a straightforward repudiation of existing agreements as to the supervisory and sergeants and lieutenants units, as well as an unlawful unilateral change in the midst of bargaining, and the fact-finding process, as to the non-supervisory unit. The County proffered no traditionally accepted or viable defense to its otherwise straightforwardly unlawful conduct. The Employer did advance multiple esoteric defenses which are addressed below, with the remainder of the discussion divided into narrow sub-sections specific to the County's several claims.

1. Financial Exigencies Do Not Excuse a Statutory Violation

As in the prior litigation, the County asserts that its unilateral action is somehow excused by the existence of a claimed financial crisis. As the Commission held in *Wayne County Bd of Commissioners (WCBA)*, 1985 MERC Lab Op 1037, even a *bona fide* financial crisis does not justify an Employer's repudiation of its contractual obligations or permit a unilateral change in conditions of employment during a fact-finding proceeding. Notably, the County persists in this argument despite the fact that in that same decision of nearly 30 years ago, the Commission held that the County's asserted defense of an inability to pay due to a financial crisis was then so untenable that it was, as a matter of law, a "*patently frivolous*" defense such that an award of costs and attorney fees to the Charging Party was appropriate. *Wayne County Bd of Commissioners (WCBA)*, 1985 MERC Lab Op 1037, 1040-41, relying in part on the prior rejection of the "economic necessity" defense in *City of Detroit (DOT)*, 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985). See also, rejecting the economic necessity defense, *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901; *Taylor Bd of Ed*, 1983 MERC Lab Op 77.[10]

The whole point of the prohibition on various forms of unilateral action is that for one party to exercise sole authority over basic terms of the relationship is destructive of the entire fabric of labor relations and the very premise of good faith bargaining—that is, that making compromises results in a binding agreement that gives each side stability. If such conditions can be unilaterally altered, both stability and the possibility of productive future discussions are destroyed. To find otherwise, would dismantle the balance of compromises reached by parties through good faith bargaining and would be destructive of the goal of voluntary resolution of labor disputes, which is the underpinning of government regulation of labor disputes. *Oakland Univ*, 23 MPER 86 (2010); *Kalamazoo County & Sheriff*, 22 MPER 94 (2009). See also, MCL 423.1, wherein the labor policy of the State is declared: "*[T]he best interests of the people of this state are served by the prevention or prompt settlement of labor disputes. . . and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency*" will best promote those interests.

Moreover, and to put it bluntly, it is especially important that parties play by the rules during hard times. Many public entities are facing extreme financial distress. As seen in instance after instance by this agency, most employers and most unions representing the employees are, albeit grudgingly and frequently with some drama, acting responsibly and making new deals which take into account the present economic realities. After several decades in which unions in the public sector generally were able to regularly deliver improvements in working conditions, it is understandably difficult for union leadership to go to the membership, often repeatedly, to seek approval of objectively unattractive new terms of employment. The resolute and responsible actions now asked of such union leaders cannot reasonably be expected to occur if employers do not themselves play by the rules. A union cannot likely sell a new concessionary deal to its members where, as here, the Employer is, with an openly stated belief in its own impunity, flouting the rules by unilaterally and adversely changing conditions of employment. Further, to ignore the corrosive effect such unilateral conduct would have on future negotiations would be to fail to exercise what the appellate courts have properly recognized as "MERC's expertise and judgment in the area of labor relations." *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 323 n18 (1996).

[10] Notably, a different outcome may well arise where an overspending governmental entity legitimately and formally seeks bankruptcy protection.

2. Deferral to Arbitration Is Not Appropriate

Just as in the recent prior cases, the County makes the equally unavailing argument that MERC should defer to arguably available contractual remedies on the County's theory that there is a *bona fide* dispute over the interpretation of the parties' collective bargaining agreement. First, as to the non-supervisory unit, arbitration was presumably not available as its collective bargaining agreement with the County had expired and with it the duty to arbitrate.[11] Further, and to the contrary, there was never a *bona fide* good-faith dispute over the question of the contractually mandated benefits, or over the right of either party to unilaterally abandon or modify its own obligations. As in the prior cases there is no question amenable to arbitration here, as the County has repudiated its obligations rather than asserted a good faith dispute over some detail of its duties. The Commission will not find repudiation on the basis of an isolated breach, *Crawford County Bd of Comm'rs,* 1998 MERC Lab Op 17, 21; however, here the deferred compensation benefit cut applied across the board to the entirety of the several AFSCME units. The cut was indisputably unilateral and occurred during a period when respectively, collective bargaining agreements were in place or the bargaining obligation still attached. The County proposal to the Commission to remand the matter to arbitration is merely a tactic intended to avoid substantive and effective review or remedy. The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its collective bargaining obligations. *University of Michigan,* 1971 MERC Lab Op 994, 996, citing *NLRB v C & C Plywood Corp,* 385 US 421 (1967). If the term or condition in dispute is "covered by" a provision in the collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration where there is any good faith dispute as to the nature of the contractual obligation. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich. 309, 317-321 (1996). Here there is no good faith dispute over the parameters of the Employer's obligations; rather, the County seeks to instead unlawfully reject its existing obligations contrary to its duty to bargain. Where such repudiation has occurred, the Commission is prohibited, by prior decision of our Supreme Court, from deferring to contractual arbitration and must instead enforce the statutory obligations on behalf of the people of the State. See, *Detroit Fire Fighters Ass'n v. City of Detroit,* 408 Mich. 663, 676 (Mich 1980). Moreover, the County's asserted defenses are statutory and Constitutional rather than

[11] The Respondent has previously taken the position, as to these same parties, that there is no duty to arbitrate disputes which arose after expiration of an agreement, such as here with the non-supervisory unit. See, *AFSCME Council 25 v Wayne County,* 290 Mich App 348 (2010).

contractual and, therefore, are not within the purview of a private arbitrator.

3. The Parties Were Not at Impasse in October 2010

As also discussed above, the Commission has defined impasse as the point at which the parties' positions have so solidified that further bargaining would be futile. *Wayne County (Attorney Unit),* 1995 MERC Lab Op 199, 203; *City of Saginaw,* 1982 MERC Lab Op 727. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. As resort to such self-help is disfavored, the Employer bears the substantial burden of establishing the existence of a "good faith" impasse and that neither party was willing to further compromise. As held in the November 2012 Decision, and as to the non-supervisory AFSCME unit, the parties were not at a good faith impasse in bargaining in December 2010, as then asserted by the Employer, and therefore could not possibly have been at an impasse earlier in October of 2010 when the disputed pension changes were enacted.

4. The County Had Not Bargained In Good Faith Prior to Declaring Impasse

Even assuming *arguendo* that an impasse had, contrary to the prior Decision, existed in either October or December 2010 between the County and the Union as to the non-supervisory unit such that disfavored unilateral action was permissible, there must still be a review of the totality of the circumstances to determine if that alleged impasse was reached in "good faith". *Capac Comm Schls,* 23 MPER 46 (2010); *Flint Twp,* 1974 MERC Lab Op 152, 157; *Warren Education Association,* 1977 MERC Lab Op 818; *Mecosta Co. Park Comm.,* 2001 MERC Lab Op 28, 32 (no exceptions). It must be determined whether the party asserting the existence of an impasse *"has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement"* See, *Union-Sebewaing Area Schools*, 1988 MERC Lab Op 86, relying in turn on *DPOA v Detroit,* 391 Mich 44 (1975).

In this series of cases, there can be no question but that the County engaged in bad faith bargaining, where the County made demands which sabotaged any possibility of securing an agreement and where there were pervasive unremedied violations of the Act, including multiple unilateral changes in conditions of employment during the bargaining effort; unlawful unilateral changes in conditions of employment during the fact-finding process; retaliatory holiday furloughs; a draconian health insurance cut off; and then deferred compensation benefit cuts. Adjudicated findings of other contemporaneous unfair labor practices by an employer are relevant circumstantial evidence of unlawful motive by that employer in the context of a discrimination or bad faith bargaining charge. See, *Oaktree Capitol Mgt*, 353 NLRB No. 27 (2009); *Shattuck Mining Corp v NLRB*, 362 F2d 466, 470 (CA 9, 1966). Each separate finding of an unfair labor practice must stand on its own merits; however, unlawful conduct occurring between the same parties during the same round of negotiations is certainly relevant. Indeed, such contemporaneous acts are unavoidably part and parcel of analyzing a party's conduct and the "totality of the circumstances". It is of particular significance that the County is a large and sophisticated employer with many decades of experience in labor negotiations and a track record in litigation arising from the 1980s disputes. The County knows how to comport itself within the ordinary bounds of the law and chose to do otherwise.

As noted by ALJ Peltz in *Wayne County*, C09 J-211(Sept 2011), this same public Employer has been found to have violated its duty to bargain in good faith under PERA with this same Union multiple times during this same round of contract negotiations. In *Wayne County*, 26 MPER 2 (2012), the Commission adopted Peltz' recommended finding that the Employer violated its duty to bargain by, during this same round of bargaining, repudiating its contractual obligation to provide health insurance benefits to certain disabled County workers. In *Wayne County*, 24 MPER 12 (2011), the Commission held that the County violated the duty to bargain by repudiating its contractual obligations by failing to make annual service adjustment increases of 2% of salaries in 2009 to members of the AFSCME bargaining units, again while the parties were at the table in this round of bargaining. As noted above, an indistinguishable claim was pending, but later withdrawn, in *Wayne County*, C10 F-158, arising from the unilateral withholding of the 2010 annual 2% service adjustment, which notably occurred after the 2009 unilateral withholding had already been found to have been unlawful. In *Wayne County*, 24 MPER 25 (2011), the Commission concluded that the County violated its statutory bargaining obligation by unilaterally reducing the length of the workweek for these same unit members, likewise as a part of this bargaining round. In that case, there were no material facts in dispute and the Employer's position was indistinguishable from arguments previously rejected by the Commission in the 1980s case involving the same parties. After no exceptions were filed in *Wayne County*, 22 MPER 80 (2009), enf'd (Unpub CA No 294459) (March 1, 2010), the Commission affirmed the finding of the ALJ that the County breached its duty to bargain in good faith by ignoring this same Union's request for presumptively relevant information. The County was additionally found to have brought a meritless ULP Charge against the

Union in an improper effort to block a collateral contract enforcement action in the Wayne County Circuit Court. *AFSCME Council 25,* 22 MPER 102 (2009), aff'd 24 MPER 19 (CA Unpub # 295536, 3/22/11).

5. The Separation of Powers and Legislative Body Constitutional Authority Defenses

The County asserted a defense that the Charges should be dismissed in deference to the legislative authority of the County Commission. It was argued that the County Commission's decision to amend the pension ordinance is unreviewable under PERA, for to do so would purportedly infringe on the separate legislative authority of the County Commission. Such claims for exemption from the strictures of PERA by various units of government have been routinely rejected, whether based on a charter or even Constitutional authority. See, *Wayne County Civ Serv v Wayne County,* 384 Mich 363 (1971); *Pontiac Police v Pontiac,* 397 Mich 674 (1976); *CMU Faculty v CMU,* 404 Mich 268 (1978).[12]

The underlying theory has likewise been resoundingly rejected. It is a truism that the County Commission has exclusive authority to decide for itself what ordinances to adopt and to later amend, repeal, or replace such ordinances; however, the mere adopting of an ordinance does not lawfully effectuate changes in conditions of employment where a bargaining obligation otherwise exists. That claim of an ability to sidestep bargaining obligations imposed by State statute by the expedient of enacting conflicting local laws was flatly rejected, as to retirement benefits, in the seminal *Detroit Police Officers Association v Detroit,* 391 Mich 44 (1974). See also, *AFSCME et al v Detroit,* 218 Mich App 263 (1996); *City of Detroit (Fire Fighters),* 1982 MERC Lab Op 150. Simply, the County Commission can indeed pass any local ordinance or even Charter amendment that it sees fit to enact; however, neither the County Commission nor the County Executive can implement such changes without first fulfilling the duty to bargain under State law.

The County further asserted that the "Employer" could not be held liable for an unfair labor practice based on actions of its purportedly separate legislature. The argument is based on a nonsensical syllogism, which begins with the unremarkable fact that the Union negotiates collective bargaining agreements with the County Executive, with the major premise then offered that such negotiations necessarily require the

[12] Regardless, the novel theory of unreviewable legislative action would likely run afoul of federal and state constitutional protections against Legislative impairment of contracts, the taking of private property rights by the government without compensation, and the constitutional guarantee of substantive due process. See, *AFT Michigan v State of Michigan,* 297 Mich App 597 (2012).

conclusion that the County Executive is the "Employer"; the secondary premise is the equally obvious fact that the County Commission is a legislative body separate from the County Executive; the offered conclusion is that therefore the County Commission is *not* the Employer, and therefore could not have violated PERA through unilateral changes to conditions of employment which only an *employer* is prohibited from making. While such constructs may find utility in an undergraduate logic class, they are ill-suited to legal argument or to the regulating of the affairs of major institutions.

The defects in the syllogism are myriad. First, the County Executive is not the "Employer" and neither is the County Commission. The "Employer" is *Wayne County* which is the only legally recognized body politic which can hold property, authorize contracts, sue, and be sued in its own name (in for example the present regulatory action). Second, while the Union meets with the County Executive (or his designees) to negotiate a collective bargaining agreement, any such agreement is subject to ratification, or rejection, by the County Commission, underscoring that the "Employer" is of two equal, joined, and necessary parts when it comes to labor relations. Regardless, the PERA, when it prohibits action by a "public employer" likewise and expressly prohibits the same action by "any officer or agent" of that "employer", such that, any action by the County Commission, the County Executive, or a mere department head or supervisor of the County, would be attributable to the County for purposes under PERA.

In effect, what the County asks through this theory is that the Commission, as an administrative agency, ignore, set aside, or reverse the seminal interpretation of PERA by the Michigan Supreme Court in a 40-year old decision, perhaps predictably, involving Wayne County itself. When PERA was enacted in 1965, it created entirely new, and often equally uncertain and unwelcome, obligations on public employers. There was then legitimate good faith uncertainty about such fundamental questions as which entity was the employer and who spoke for it. The Wayne County Civil Service Commission brought an action for declaratory judgment respecting who was the employer of employees of Wayne County for purposes of collective bargaining under PERA. In that action, the Civil Service Commission asserted that based on long standing State statutory authority, which had created the Wayne County Civil Service System, it had exclusive authority over such things as setting wages and benefits for County employees and that it, not the County Commission (then called a Board of Supervisors), was the statutory "employer" for purposes under PERA. See, *Civil Service Commission for the County of Wayne v Wayne County Board of Supervisors*, 384 Mich 363 (1971).

The Court recognized the legitimate difficulties faced by efforts at compliance with the then-new PERA and its then unfamiliar obligations. There was then uncertainty about which branch of local government or which particular entity was, in effect, in charge when it came to labor relations when employees chose to unionize under PERA. Nonetheless, the Court sought, with until now near uniform success, to put to rest such arguments. Where differing branches of government sought to assert control over bargaining based on prior rights or powers, in the face of new statutory obligations under PERA, the Court found that the newer statutory obligations under PERA operate "*to the extent of repugnancy*" as a repeal of prior statutory obligations or rights. Citing, *Breitung v Lindauer*, 37 Mich 217 (1877).

The Court found that "*In short shrift this means that the purposed thrust of the act of 1965* [of regulating bargaining] *must be implemented as provided therein*" and that conflicting claims of "*authority and duty*" made by a particular governmental entity were "*diminished pro tanto by the act of 1965 to the extent of free administration of the latter according to its tenor*". To paraphrase and follow the command of *Civil Service v Wayne County*, the Wayne County Commission remains a separate branch of the County government, co-equal with the County Executive in most matters and with greater powers regarding the ultimate allocation of resources; however, any claims of unreviewable action by the County Commission in the field of labor relations, including regarding employee wages and benefits, "was diminished *pro tanto*" by the passage of PERA.

6. The Retired Status of Prior Recipients of the 13th Checks Does Not Insulate the County From Liability

The County asserts that MERC lacks jurisdiction to resolve this dispute, which the County defines as involving a mid-term modification to benefits of already retired former employees, in reliance on its interpretation of the decision in *Butler v Wayne County*, 289 Mich App 662 (2010).[13] The County is correct that a violation of PERA will not be found as to a refusal to bargain regarding already retired individuals, for they are not "employees" under the Act, and therefore, not subject to mandatory bargaining obligations. However, the County's analysis of the issue is defective. Under PERA, enforceable agreements can be reached promising current employees deferred compensation benefits that will be collected only in retirement. Neither party is obliged to re-negotiate such

[13] In *Wayne County*, 26 MPER 22 (2012) MERC upheld a finding of a violation by the County, in unilaterally withholding health care benefits from disability retirees, specifically finding Wayne County's reliance on the Butler decision to be "*misplaced*". The *Butler* decision was an unremarkable one, finding that the complained of action by the employer had been specifically authorized by the contract in question.

promises as to individuals who have already retired, as they are no longer "employees" under the Act, and the Union is no longer their exclusive bargaining agent. The parties may nonetheless choose to negotiate over benefits to be received by already retired individuals; however, such bargaining topics are deemed "permissive" in that either party may refuse to negotiate over the questions.

Simply, future pension rights for existing employees are mandatory subjects of bargaining. Regarding already retired individuals, promised benefits are locked in and changes in those benefits are at best a permissive subject of bargaining. Collective bargaining agreements predictably, and almost necessarily, frequently contain agreements as to both mandatory and permissive subjects. Those agreed upon benefits become intertwined such that a repudiation of one benefit is a repudiation of the entire package and therefore a violation of PERA. See, *Kalamazoo County & Sheriff*, supra.

Additionally, as to the not yet retired employees, the unlawful repudiation is in denying them the contractual right to collect promised benefits in the future, such as here, the 13th checks in such amounts as the market forces may make available under the formula used by the pension board to allocate 'excess earnings'. Further, as to current employees of Wayne County, the repudiated promise of most immediate significance is the Employer's promise to maintain the IEF reserve funds "for the benefit of employees" and to not spend it for its own purposes. Here, current employees are entitled to insist that the County restore the funds, and funding mechanism, so that when the current employees retire in the future, the funds necessary to provide them with their promised and anticipated 13th checks will still be there.

Moreover, and as the County is well aware, a violation may be found where an Employer contractually promises to provide certain benefits upon retirement and then, without bargaining, repudiates that promise. In *Wayne County (AFSCME)*, 26 MPER 22 (2012), one of the series of cases arising from this same 2009-2010 bargaining debacle, the Commission found a violation and ordered relief where the County unilaterally announced that it would no longer provide health care benefits to certain classes of employees who left work on a disability pension. That change altered existing promised benefits, was unilateral, and was therefore unlawful.

7. The *Studier* Decision Is Irrelevant to Any Analysis Under PERA

The County relies on a tortured application of the decision in *Studier v MPSERS*, 472 Mich 642 (2005), to excuse its unilateral changes, which would otherwise be unlawful under PERA. The *Studier* case involved a claim by public school retirees challenging an increase in their insurance premium copays as a claimed violation of Article 9, section 24 of the Michigan Constitution. That clause of the Constitution expressly protects "accrued financial benefits" under public pension plans from any later impairment. The Court held that the Constitutional protection extended only to traditional pension benefits under a pension plan, that is the usual monthly pension check, and that the Constitutional protection did not extend to non-pension benefits, such as retiree health insurance, or to other collateral benefits offered under State statutes. *Studier* did not address any issues under PERA.

It perhaps states the obvious, but this unfair labor practice case is not about the Constitutionality of a County ordinance change. The rights protected under PERA may well not rise to the level of independently Constitutionally-protected, nor does that standard need to be met to prevail in an unfair labor practice case. None of the multiple bargaining violations already found arising from Wayne County's conduct during the 2009-2010 bargaining cycle likely rise to the level of Constitutional violations. The statutory right of employees to not have their wages unilaterally cut, the length of their workweek shortened, their continued receipt of health insurance coverage denied, or as here, the continued functioning of the negotiated IEF gutted, do not need to rise to the level of Constitutionally-protected rights to be nonetheless protected under PERA.

8. The *Wayne County Retirement System v Wayne County* Decision Is Irrelevant to Any Analysis Under PERA

The County relied heavily on a September 2011 decision by Wayne County Circuit Court Judge Sapala, in *Wayne County Retirement System v Wayne County*, in which the trail court opined that the unilateral changes to the IEF benefits were not unlawful under 1963 Const art 9, section 24. The Circuit Court made certain findings regarding the nature of the collective bargaining agreements between the County and the Union, in *dicta*, and significantly, in a case in which the Union was not a party. The County seeks to grant special significance to the Circuit Court's finding that the IEF benefits were not "accrued financial benefits". Of course they were not, and therefore they were not Constitutionally protected against impairment. If the involved employees were not represented by Unions and subject to collective bargaining agreements, the County would have had a free hand in changing conditions of employment, as is routinely true regarding non-union employees. That recognition alters nothing regarding the lawfulness of the conduct under PERA. Regardless, the Sapala decision was reversed in *Wayne County Retirement System v Wayne County*, 301 Mich App 1 (2013). The appellate court found that the ordinance challenged in this case also violated the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*, and ordered restoration of the improperly diverted $32 million dollars. The appellate court did not address the PERA questions that are before this tribunal. Except to the extent that the relief ordered herein may be duplicative in part of the relief already ordered by the Court of Appeals, both of the decisions are irrelevant to these proceedings.

9. The *Macomb County* Decision Supports the Finding of A Violation in this Instance

Both parties rely on the Michigan Supreme Court decision in *Macomb County v AFSCME Council 25*, ___Mich___ (No. 144303, June 12, 2013). In that case, the Court reversed MERC in its earlier finding of a violation where Macomb County acting through its retirement board altered a long standing reliance on a particular actuarial table used to calculate benefits, to the disadvantage of some retirees. The decision functioned primarily to return the Commission to a closer hewing to the standard provided under *Port Huron Education Ass'n v Port Huron Sch Dist*, 452 Mich 309 (1996).

In *Macomb County*, at the MERC ALJ level, no violation of the statute was found. The Commission decision reversing ALJ Stern was in turn ultimately reversed by the Supreme Court. The grounds prove not relevant to the present matter. The Supreme Court found the underlying collective bargaining agreement in Macomb to be unambiguous and that it expressly provided discretion to the retirement board to make the challenged change in mortality tables. The Court held that MERC had erred by relying on a past practice, *albeit* of several decades duration, of using the same actuarial table as a basis for finding an unlawful unilateral change, rather than respecting the unambiguous language of the contract which, even if long unused, expressly allowed the retirement board to make the change in mortality tables.

The Court in *Macomb* reaffirmed the right of parties to rely on their agreements, as held in the earlier *Port Huron* case, the holding of which remains controlling law. In the instant case, the unambiguous language of the contracts supports a finding of a violation.[14] The parties here expressly provided for a particular benefit to be funded and disbursed in a particular manner. Their agreements were memorialized both in

[14] The Union did here additionally make a "past practice" argument in support of its opposition to the unilateral changes made by the Employer, but I find the argument to be mere surplusage where the express contract language precluded the action taken by the Employer.

contract and in ordinance. The County sought, unsuccessfully as to the non-supervisory unit, to negotiate a prospective change in entitlement to benefits. Failing at that, the County acted unilaterally in passing and then enforcing an ordinance to unilaterally almost entirely take away a negotiated benefit. The *Macomb* decision affirms rather than detracts from the enforcement of rights as to an unambiguous agreement.

A portion of the *Macomb* decision re-affirms earlier case law requiring MERC to refer back to arbitration disputes "covered by" a collective bargaining agreement which had in it an arbitration clause where there was any colorable claim that the complained of conduct was allowed under the contract. The Court held that such disputes are for arbitrators, not the Commission, to decide. Here, the "covered by" analysis fails for two separate reasons. First, as to the non-supervisory unit, which contains the bulk of the effected employees, there was no contract in place at the time of the unilateral change in conditions and no arbitration clause to which the matter could be deferred. Second, as more fully discussed above, the County simply had and advanced no even arguable basis under the prior ordinance or several collective bargaining agreements which could excuse its conduct. Simply, no plausible contractual defense was proffered. Rather, the Employer here advanced statutory and Constitutionally based defenses which are not amenable to resolution by a private arbitrator.

Moreover the County seeks to turn the *Macomb* decision on its head. In *Macomb,* the Court found that the contract language expressly granted the retirement board the discretion to make certain decisions, and the retirement board made such a decision well within its established discretion. Here, the unilaterally imposed new Wayne County ordinance took away from the pension board the discretion which the parties had expressly agreed the pension board alone would wield.

10. The Fact that the Prior Agreements of the Parties Were in Part Memorialized In Ordinance Amendments Does Not Excuse Unilateral Changes

The County advances the additional novel and implausible theory that because the pension obligations immediately in dispute were primarily recorded in an ordinance rather than in the collective bargaining agreements, the unilateral change was not a violation of the duty to bargain. The County relies on the unremarkable assertion that because the County Commission as a legislative body has the right to adopt ordinances, it has the corollary right to repeal or amend ordinances. First, under *Detroit Police Officers Ass'n (DPOA) v. Detroit,* 391 Mich 44, 54-55 (1974), it is perfectly appropriate for parties to memorialize their negotiated agreements in various forms. The Supreme Court in *DPOA* expressly noted that under the plain language of PERA, it is proper for parties to negotiate and to then record their deal in a collective bargaining agreement, in a memorandum of understanding, or by passing an appropriate ordinance or resolution, as in the *DPOA* case itself which involved a municipal pension ordinance. In relevant part, the statute provides that once a deal has been struck, it may be memorialized by *"the execution of a written agreement, ordinance, or resolution"* incorporating the agreed upon terms. See, 423.215 (1). It is not in the least uncommon for parties to memorialize a municipal pension deal by passing an amended ordinance, as here, and especially as to pension issues where typically, a union representing some employees negotiated beneficial changes which are then applied across the board to all employees, even those not in a bargaining unit.

Moreover, in addition to the original 1986 and the revised 2000 ordinance, the parties did, in fact, memorialize their deferred compensation agreements in the several collective bargaining agreements. In those agreements, the parties contractually committed themselves to the maintenance of the retirement benefits described in the then-existing pension ordinance, which they expressly agreed *"shall control except where amended or changed"* within the collective bargaining agreement itself. Thus, the pre-existing ordinance was incorporated by reference in the parties' written agreements.

Conclusion

The County has offered no substantive or valid reason why it should, in this latest instance, be excused from the obligations uniformly imposed on all other employers that are subject to PERA. This holding, as was true of the historical *Wayne County* cases, does not require that the County continue to provide services in excess of its budgetary capacity; instead, it requires the County to exercise budgetary discipline in the manner to which it has voluntarily committed itself, both before and after this dispute. The County cannot now unilaterally change existing conditions of employment without violating PERA any more than it could during the earlier economic downturn of 1982-83. The retirement related benefit cuts were an unlawful unilateral change in basic conditions of employment implemented in violation of the County's well-established obligations under Section 10(1)(e) of PERA to bargain in good faith, to refrain from repudiating prior agreements, and to maintain pre-existing conditions of employment during the bargaining process.

I have carefully considered any additional arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Wayne County, its officers, agents, and representatives shall:

1. Cease and desist from

    a. Failing to bargain in good faith with the representative of its employees, including by failing to participate in good faith in the fact-finding process;
    b. Unilaterally altering any established conditions of employment during the bargaining process and prior to the conclusion of good faith bargaining and fact-finding proceedings;
    c. Asserting that there exists an impasse in bargaining where there are related and unremedied unfair labor practices committed by the Employer;
    d. Unilaterally altering benefits during the pendency of good faith bargaining and fact-finding proceedings;
    e. Seizing assets held for the benefit of employees, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining;
    f. Where an unexpired collective bargaining agreement is in place, repudiating the terms of such agreements and refusing to comply with the unambiguous obligations under such agreements;
    g. Interfering in the holding and distribution of assets by the retirement board from the IEF when it is acting pursuant to authority expressly granted to it by the parties, whether through agreement memorialized in the pension ordinance or in separate written collective bargaining agreements.

2. Take the following affirmative action necessary to effectuate the purposes of the Act

    a. Bargain in good faith with AFSCME regarding successor collective bargaining agreements as to each of the several units as the respective contracts expire;

b. Affirmatively renounce reliance on the September 30, 2010 pension ordinance amendment;
c. Restore to the Inflation Equity Fund the entirety of the approximately $32 million in assets diverted from the IEF following the adoption of the September 30, 2010 ordinance amendment, to the extent that the assets have not already been restored pursuant to an order of the Court in the collateral proceedings;
d. Affirmatively renounce and cease any effort at enforcement of the $12 million cap on assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;
e. Affirmatively renounce and cease any effort at enforcement of the $5 million cap on annual distributions from assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;
f. Provide statutory interest to, or otherwise make whole, the IEF for the deprivation of the approximately $32 million in assets and the intervening lost earnings on those assets;
g. Refrain from any interference in the distribution of the so-called "13th checks" by the retirement board, including in the distribution of any make-up or backpay checks as may be issued in the discretion of the retirement board;
h. Otherwise make whole all AFSCME bargaining unit members adversely effected by the unilateral changes in conditions of employment found unlawful in this Decision;
i. Provide the Union with the full calculation of amounts reimbursable to the IEF, or unit members, and interest on same;
j. Maintain all existing conditions of employment throughout the bargaining and fact-finding process.

3. Post the attached notice to employees in a conspicuous place at each County worksite and post it prominently on any website maintained by the County for employee access for a period of thirty (30) consecutive days, and additionally deliver a copy of

the notice by mail or email to each employee in the AFSCME bargaining units.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 10, 2013

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, WAYNE COUNTY, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Fail to bargain in good faith with the representative of its employees, including by participating in good faith in the fact-finding process;
b. Unilaterally alter any established conditions of employment during the bargaining process and prior to the conclusion of good faith bargaining and fact-finding proceedings;
c. Assert that there exists an impasse in bargaining where there are related and unremedied unfair labor practices committed by the Employer;
d. Seize assets held for the benefit of employees, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining;
e. Where an unexpired collective bargaining agreement is in place, repudiate the terms of such agreements and refuse to comply with the unambiguous obligations under such agreements;
f. Interfere in the holding and distribution of assets by the retirement board from the Inflation Equity Fund.

WE WILL

a. Bargain in good faith with AFSCME regarding successor collective bargaining agreements as to each of the several units as the respective contracts expire;
b. Maintain all existing conditions of employment throughout the bargaining and fact-finding process;
c. Affirmatively renounce reliance on the September 30, 2010 pension ordinance amendment;
d. Restore to the Inflation Equity Fund the entirety of the approximately $32 million in assets diverted from the IEF following the adoption of the September 30, 2010 ordinance amendment, to the extent that the assets have not already been restored pursuant to an order of the Court in the collateral proceedings;
e. Affirmatively renounce and cease any effort at enforcement of the $12 million cap on assets held in the IEF, unilaterally

imposed through the adoption of the September 30, 2010, ordinance amendment;

f. Affirmatively renounce and cease any effort at enforcement of the $5 million cap on annual distributions from assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;
g. Provide statutory interest to, or otherwise make whole, the IEF for the deprivation of the approximately $32 million in assets and the intervening lost earnings on those assets;
h. Refrain from any interference in the distribution of the so-called "13th checks" by the retirement board, including in the distribution of any make-up or backpay checks as may be issued at the discretion of the retirement board;
i. Otherwise make whole all current or former AFSCME bargaining unit members adversely effected by the unilateral changes in conditions of employment found unlawful in the Decision in MERC Case No C10 J-266;
j. Provide the Union with the full calculation and method of calculation of amounts reimbursable to the IEF, or unit members, and interest on same;
k. Cooperate with the pension board in providing each bargaining unit member to whom a reimbursement is owed a detailed accounting and explanation of the method of calculation of all amounts reimbursed, with a separate check for the reimbursable amount, and with disclosure of the fact that the reimbursement is being made pursuant to the Order in this matter.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

WAYNE COUNTY

By: ____________________

Title: ____________________

Date: ____________

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.

2006 WL 2457485
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

BAY CITY POLICE AND FIRE RETIREES, Jerry Barbret, William Powell, Gary Fox, Jerry Zielinski, Paul A. Roznowski, Owen Gwizdala, Richard Fierens, George Cardinal, Emmons Miller, Larry McDermott, Dennis Sharp, James Fogelsonger, Leon Leszczynski, and Richard Gonyea, Plaintiffs-Appellees,
v.
BAY CITY POLICE AND FIRE RETIREMENT SYSTEM BOARD of Trustees, Kim Mead, Dan Dewaele, Ron Marande, and Tom Herek, Defendants-Appellants,
and
Asset Strategies Portfolio, Inc., and George H. Vitta, Defendants.

Docket No. 267018. | Aug. 24, 2006.

Synopsis
Background: City police and firefighter retirees brought action against police and firefighter retirement system board of trustees asserting breach of fiduciary duties and seeking money damages for improper investment of retirement system assets. Trustees moved for summary disposition on the basis of governmental immunity. The Circuit Court, Bay County, denied the motion, and also denied trustees' motion for reconsideration. Trustees appealed.

[Holding:] The Court of Appeals held that the board of trustees was a "quasi-judicial body" entitled to immunity.

Reversed and remanded.

Bay Circuit Court; LC No. 05-003132-CZ.

Before: KELLY, P.J., and MARKEY and METER, JJ.

Opinion

PER CURIAM.

*1 Defendants-appellants appeal as of right from the trial court's orders denying their motions for summary disposition predicated on governmental immunity and for reconsideration. We reverse and remand. This appeal is being decided without oral argument under MCR 7.214(E).

This case arises from defendant Board of Trustee's decision to invest approximately twenty percent of the Retirement System's assets in a single entity. The Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq.*, limits investments by a fiduciary that is not the state treasurer to smaller percentages of a system's total assets. See MCL 38.1140a and 1140d. Accordingly, an Opinion of the Attorney General concluded that "the Bay City Police and Fire Pension Plan and Retirement System Board of Trustee's investment of 20% of the system's total assets in the Advanced Investment Management Enhanced Equity Index Commingled Fund LP was not an authorized investment under the Public Employee Retirement System Investment Act." OAG, 2003, No 7144, p 4 (November 5, 2003).

Plaintiffs commenced action, asserting a breach of fiduciary duties against defendants-appellants and seeking money damages. Defendants-appellants moved for summary disposition on the basis of governmental immunity. The court denied the motion, explaining as follows:

> The cases cited in Defendant Trustees' brief provide ample support for the proposition that investment of retirement funds is a governmental function, however ... Plaintiffs have alleged facts attacking the remaining two conditions necessary for Defendant Trustees to enjoy the protection of governmental immunity. Specifically, Plaintiffs' complaint makes allegations that would show Defendant Trustees were not acting within the scope of their authority, and could not have reasonably believed they were doing so, and also that Defendant Trustees were grossly negligent in performing their duties. These include detailed allegations as

> to why Defendant Trustees were not statutorily authorized to make the investment, the assertion that they made no effort to seek legal counsel as to the propriety of the investment, as well as other alleged failures to act that would show Defendant Trustees did not take reasonable measures to protect the retirement fund's beneficiaries.

In denying defendants-appellants' motion for reconsideration, the trial court explained that, although the allegation of a violation of a statute is one of ordinary negligence only, not gross negligence, plaintiffs had pleaded in avoidance of governmental immunity by asserting that the trustees had "authorized the investment of a quantity of funds that greatly exceeded the amount the Board was statutorily allowed to invest in any one investment" and could not have reasonably believed they were authorized to do so.

On appeal, defendants-appellants assert that they are entitled to governmental immunity because they reasonably believed their actions were within the scope of their governmental authority, and, alternatively, that the System's Board of Trustees is a quasi-judicial body that is entitled to quasi-judicial immunity.

*2 This Court reviews a trial court's decision regarding a motion for summary disposition de novo as a question of law. *Ardt v. Titan Ins. Co.,* 233 Mich.App. 685, 688, 593 N.W.2d 215 (1999). MCR 2.116(C)(7) authorizes motions for summary disposition premised on "immunity granted by law...." A motion for summary disposition based on governmental immunity is decided by examining all the documentary evidence submitted by the parties and determining whether immunity applies. *Tarlea v. Crabtree,* 263 Mich.App. 80, 87, 687 N.W.2d 333 (2004).

[1] Fire fighters' and police officers' retirement systems' boards of trustees are legislatively defined as quasi-judicial bodies, whose "actions," generally, are reviewable only by writ of certiorari. MCL 38.555.[1] Quasi-judicial immunity "is available to those serving in a quasi-judicial adjudicative capacity as well as 'those persons other than judges without whom the judicial process could not function.' " *Maiden v. Rozwood,* 461 Mich. 109, 134, 597 N.W.2d 817 (1999), quoting 14 West Group's Michigan Practice, Torts, § 9:393, p 9-131. Because the Legislature has determined that defendants-appellants constitute a quasi-judicial body, they are entitled to the benefits of quasi-judicial immunity. Accordingly, rather than suing the board and its members for damages, plaintiffs should have sought a writ of superintending control to correct the erroneous decision. See MCL 38.555, MCR 3.302(C), and *Glinski v. Detroit Policemen & Firemen Retirement Sys.,* 34 Mich.App. 161, 164, 190 N.W.2d 728 (1971).

In their appellate brief, plaintiffs cite the dissenting opinion in *Payne v. Muskegon,* 444 Mich. 679, 726, n. 16, 514 N.W.2d 121 (1994), in support of the proposition that only defendants' judicial or quasi-judicial decisions, and not their investment decisions, should be entitled to quasi-judicial immunity. However, the language in MCL 38.555 is clear; it broadly states that, as a quasi-judicial body, a retirement board's "actions," not just its judicial or quasi-judicial decisions, "shall be reviewable by writ ... only." If the language in a statute is clear and unambiguous, courts lack the authority to interpret a meaning beyond the scope of its text. *Koontz v. Ameritech Services,* 466 Mich. 304, 312, 645 N.W.2d 34 (2002).

[2] Plaintiffs additionally argue that an analysis of the PERSIA indicates that the Legislature intended that the act adopt the same standard of care required of investment fiduciaries under the Employee Retirement Income Security Act (ERISA) and that, therefore, the PERSIA creates an exception to any governmental immunity otherwise granted to public employee retirement boards. However, regardless of whether the PERSIA does, in fact, apply the same standard of care required of investment fiduciaries under the ERISA, that fact does not alter the broad grant of quasi-judicial immunity to public employee retirement boards under MCL 38.555.

We conclude that the trial court should have granted defendants-appellants summary disposition, albeit on a basis not considered by the trial court.

*3 Reversed and remanded for entry of an order granting summary disposition to defendants-appellants. We do not retain jurisdiction.

Footnotes

1 We note that MRE 3.302(C) states that "[a] superintending control order replaces the writs of certiorari and prohibition and the writ of mandamus when directed to a lower court or tribunal."

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2012 WL 1698380
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Danny McDOLE, Plaintiff–Appellant,
v.
CITY OF SAGINAW and City of Saginaw Police & Fire Pension Board a/k/a City of Saginaw Trustees of the Retirement System Board, Defendants–Appellees.

Docket No. 303770. | May 15, 2012.

Saginaw Circuit Court; LC No. 10–010637–NZ.

Before: OWENS, P.J., and TALBOT and METER, JJ.

Opinion

PER CURIAM.

*1 Danny McDole appeals as of right the trial court's order granting summary disposition in favor of City of Saginaw ("the City") and City of Saginaw Police & Fire Pension Board a/k/a City of Saginaw Trustees of the Retirement System Board ("the Board"). We affirm.

McDole was employed by the City until he was terminated in February 2006. McDole successfully brought a race discrimination suit against the City. On June 10, 2010, McDole applied for service retirement, requesting duty disability retirement. The Board denied McDole's application because he was not a member of the retirement system and thus was "ineligible to apply for a pension." As a result, McDole filed suit against the City and the Board.

The City and the Board moved for summary disposition.[1] The trial court granted summary disposition and found that McDole failed to state a claim against the City upon which relief could be granted[2] and failed to present evidence that the Board's decision was inappropriate.[3] The trial court also determined that judicial estoppel precluded McDole's case.

McDole argues that the trial court erred in granting summary disposition in favor of the City because the City and the Board are the same entity. Thus, the City was a proper party. We disagree.

This Court reviews a trial court's decision to grant summary disposition de novo.[4] Appellate review is limited to the evidence the trial court had at the time the motion was decided.[5] "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim upon which relief may be granted."[6] Summary disposition under this subrule is appropriate when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."[7] All factual allegations supporting the claim are accepted as true and construed "in a light most favorable to the nonmoving party."[8] The trial court must also consider "any reasonable inference[s] or conclusions that can be drawn from the facts."[9]

We find that the City and the Board are two separate legal entities. The City's Code of Ordinances, chapter 16, addresses the police officer and firefighters retirement system. Saginaw Code of Ordinances, § 16.04 provides that the Board shall consist of five members including the mayor, the city manager, a police officer, a firefighter, and a duly registered tax-paying elector of the City. McDole argues that the City and the Board are not separate and distinct entities because four of the five Board members are City officials. McDole, however, has failed to demonstrate how membership on the Board equates to the City and the Board being the same entity. In fact, the ordinances governinf the Board give the Board autonomous power. Therefore, summary disposition was proper.[10]

McDole also argues that the trial court erred in granting summary disposition[11] in favor of the Board because the Board was contractually obligated to provide benefits to qualified members. McDole further contends that, but for the City's discrimination, he would have been a qualified member. We disagree.

*2 "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint."[12] "[A] trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties ... in the light most favorable" to the nonmoving party.[13] "[T]he moving party is entitled to judgment as a matter of law" if "the proffered evidence fails to establish a genuine issue regarding any material fact." [14]

We review "a lower court's review of an administrative decision to determine whether the lower court applied the correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings[.]" [15] The trial court's "decision will only be overturned if this Court is left with a definite and firm conviction that a mistake was made." [16] When reviewing an administrative agency's decision, the trial court must review the entire record for "competent, material, and substantial evidence" that supports the agency's decision. [17] "If there is sufficient evidence, the [trial] court may not substitute its judgment for that of the agency, even if the court might have reached a different result." [18] Only agency decisions that are "contrary to law, ... arbitrary, capricious, or a clear abuse of discretion, [and not] supported by competent, material and substantial evidence on the whole record" will be overturned. [19]

Saginaw Code of Ordinances, § 16.07 provides in pertinent part:

> (A) *Membership of the retirement system.*
>
> (1) The membership of the retirement system shall consist of all the defined benefit police officers and firefighters who are in the employ of the City.
>
> (2) In any case of doubt, the Board of Trustees shall decide who is a member of the retirement system within the meaning of the provisions of this chapter.
>
> (B) *Termination of membership.*
>
> (1) Except as otherwise provided in this chapter, should any member cease to be a police officer or firefighter in the employ of the City, for any reason except his or her retirement, he or she shall thereupon cease to be a member and his or her credited service at the time shall be forfeited.

We find that the evidence supports the Board's determination that McDole was not a member of the retirement system when he applied for duty disability retirement. McDole's employment with the police department terminated in February 2006. In December 2006, McDole withdrew the contributions he made to the retirement system. McDole then applied for duty disability retirement over three years later in June 2010. Thus, the Board's decision that McDole was not a member of the retirement system at the time he applied for benefits was not "arbitrary, capricious, or a clear abuse of discretion" and was "supported by competent, material and substantial evidence on the whole record." [20] Additionally, McDole's assertion that the Board's decision was related to the City's discrimination lacks merit. Not only has McDole failed to provide any evidence to support this argument, but as explained above, the City and the Board are two separate entities so any alleged wrongdoing by the City cannot be imputed on the Board. As such, reversal is not warranted. [21]

***3** Finally, McDole contends that his suit is not precluded by judicial estoppel. [22] Because we found that the trial court properly granted summary disposition regarding McDole's claims against the City and the Board, it is not necessary that this issue be addressed.

Affirmed.

Footnotes

1 MCR 2.116(C)(8) and (C)(10).

2 MCR 2.116(C)(8).

3 MCR 2.116(C)(10).

4 *Innovative Adult Foster Care, Inc v. Ragin,* 285 Mich.App 466, 475; 776 NW2d 398 (2009).

5 *Id.* at 475–476.

6 *Cummins v. Robinson Twp.* 283 Mich.App 677, 689; 770 NW2d 421 (2009) (quotation marks omitted).

7 *Id.* at 689–690 (quotation marks omitted).

8 *Id.* at 689.

9 *Detroit Int'l Bridge Co v. Commodities Export Co,* 279 Mich.App 662, 670; 760 NW2d 565 (2008).

10 MCR 2.116(C)(8).

11 MCR 2.116(C)(10).
12 *Maiden v. Rozwood,* 461 Mich. 109, 120; 597 NW2d 817 (1999).
13 *Id.*
14 *Id.*
15 *VanZandt v. State Employees' Retirement Sys,* 266 Mich.App 579, 585; 701 NW2d 214 (2005).
16 *Id.*
17 *Id.* at 588.
18 *Id.* at 584.
19 *Id.* at 583.
20 *Id.*
21 *Id.*
22 *Paschke v. Retool Indus,* 445 Mich. 502, 509; 519 NW2d 441 (1994).

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

RETIRED DETROIT POLICE AND FIRE FIGHTERS ASSOCIATION INC., Plaintiff–Appellant,
v.
DETROIT POLICE OFFICERS ASSOCIATION, Detroit Police Lieutenants and Sergeants Association, Detroit Police Command Officers Association, Detroit Fire Fighters Association, The City of Detroit, and City of Detroit Police and Fire Retirement System, Defendant–Appellees.

No. 293998. | Dec. 16, 2010.

Wayne Circuit Court; LC No. 08–116128–CL.

Before: WHITECK, P.J., and ZAHRA and FORT HOOD, JJ.

Opinion

PER CURIAM.

*1 Plaintiff, Retired Detroit Police and Fire Fighters Association Inc, appeals as of right an order dismissing its claims of breach of fiduciary duty, breach of contract, and conspiracy to cause breach of fiduciary duty, for lack of standing. We affirm.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff is an association representing the interests of approximately 6,500 retired police officers and fire fighters. Defendants, Police Officers Association (DPOA), Detroit Police Lieutenants And Sergeants Association (DPLSA), Detroit Police Command Officers Association (DPCOA) Association, Detroit Fire Fighters Association (DFFA) are labor unions (collectively, "the Unions") representing, respectively, Detroit police officers with a rank of "Police Officer," Detroit police officers with a rank of "Lieutenant, Sergeant or Investigator," Detroit police officers with a rank of "Inspector or Commander," and all Detroit fire fighters. Defendant city of Detroit Police and Fire Retirement System (Retirement System) provides retirement benefits for retired and deceased police officers and fire fighters and their beneficiaries. The Retirement System has a board of directors (Board) that is responsible for its operation, management and administration.

As stated in *Policemen and Firemen Retirement System v. City of Detroit,* 270 Mich.App 74, 75, 714 NW2d 658 Mich.App (2006), the Board,

> is responsible for the general administration, management, and operation of the Policemen and Firemen Retirement System, which provides retirement and death benefits to active and retired uniformed city employees, their families, and beneficiaries.

* * *

> Several Detroit officials and employees sit on the Board, including the mayor or his representative, a city council member, the city treasurer, the police chief, the fire commissioner, three firefighters, and three police officers.

* * *

> Part of the Board's responsibilities is to ensure that the retirement system is properly funded. Accordingly, the Board, after consultation with an actuary, determines the amount of Detroit's annual pension contribution. The plan actuary calculates plan assets and liabilities to determine whether the plan is overfunded or underfunded. The annual contribution Detroit must make to the plan includes present service cost, plus a credit or additional payment depending on whether the plan is overfunded or underfunded.

On June 26, 2008, plaintiff filed a complaint against the DPOA, the DPLSA, the DPCO, the DFFA and defendant city of Detroit seeking superintending control of the Retirement System [1] to reverse a resolution allowing the city of Detroit a $25 million annual credit toward its obligation to fund the Retirement System over the following three years, should the Retirement System remain overfunded. Plaintiff alleged that the Board was overfunded in fiscal year ending June 30, 2006 by over $100 million because of an unexpected return on investments. Plaintiff alleged that the Unions and the Retirement System breached their fiduciary duties to plaintiff when various members of the Unions seated on the Board approved the resolution in exchange for the city of Detroit amending the collective bargaining agreement to provide that active employees would be reimbursed for 100 percent of their accumulated sick leave upon their retirement instead of only 70 percent. On appeal, DPCOA and DFFA freely admit that "[i]n 2008, the city again sought an offset to its contribution and offered benefit enhancements in order to encourage the allowance of these offsets." Joint Brief on Appeal, 8. DPCOA and DFFA maintain that the Unions had every reason to accept the city of Detroit's offer and no reason to reject it. Further, that the increase in final average compensation benefited the active union members and was in no way detrimental to the retired union members or the Retirement System. If the Retirement System became underfunded, the city of Detroit would have to increase its contribution to return it to fully funded status. The city of Detroit, on the other hand, simply maintains that defendants do not owe a fiduciary duty to plaintiff retirees in regard to negotiating collective bargaining agreements for active employees.

*2 Because plaintiff had requested superintending control, the case was assigned to the chief judge of the circuit court. The chief judge, in a letter to the parties' attorneys, questioned whether the instant case was properly an action for superintending control. The parties submitted briefs on the issue and the chief judge determined that the instant case was not a case for superintending control and transferred it to another judge (hereafter the trial court). There was no appeal of that decision.

After the case had been transferred, the trial court granted plaintiff's motion to amend the complaint to include claims for breach of contract and conspiracy to interfere with a contract. The trial court dismissed count 1 of plaintiff's amended complaint seeking superintending control, and no appeal of that decision was taken. The contract claim was based on an October 2004 "memorandum of understanding" signed by representatives of plaintiff, the Unions and the city of Detroit, that reflected the parties' agreement that the Board should distribute Retirement System overfunding to plaintiff's members and the Unions' members. The Retirement System was not a member to this memorandum of understanding. Plaintiff alleged that defendants breached this memorandum of understanding because in fiscal year ending June 30, 2006 the Retirement System was overfunded by over $100 million, and the Unions and city of Detroit did not seek to distribute the overfunding to the active and retired members of the Unions. Rather, plaintiff claims that the Unions influenced its members seated on the Board to allow the city of Detroit an offset over the next three years (unless the Retirement System should become underfunded) in exchange for an increase in the Unions' active members' benefits. Plaintiff also alleges this arrangement constituted a conspiracy to breach the memorandum of understanding and a conspiracy to breach the Board's fiduciary duty to all its beneficiaries.

DPOA and the city of Detroit filed motions for summary disposition to address plaintiff's additional claims. They argued that the memorandum of understanding had been superseded by an April 2001 "release and settlement agreement to distribute certain retirement systems assets" entered into by the parties. In response, plaintiff claimed that the release did not apply to the fiscal year in question. DPOA and the city of Detroit also argued that plaintiff lacked standing because plaintiff's members (1) had not suffered a concrete injury in fact and that plaintiff's claims were based on speculation because plaintiff's members have not been denied any benefit from the Retirement System; (2) the city of Detroit and the Unions were required to negotiate active members' benefits as a "a mandatory subject of bargaining;" (3) the Unions and the city owed no legal duty to plaintiff; and (4) plaintiff's members were not entitled to an increased benefit merely because active Union members received a benefit. The remaining defendants subsequently filed motions for summary disposition essentially raising the same arguments. After a hearing, the trial court dismissed plaintiff's remaining claims because plaintiff failed to show that its members had been harmed because they had not been denied any benefit from the Retirement System, and therefore lacked standing.

II. STANDING

A. STANDARD OF REVIEW

*3 Whether a party has standing is a question of law, which this Court reviews de novo. *Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.*, 479 Mich. 280, 291, 737 N.W.2d 447 (2007).

B. ANAYLSIS

Plaintiff argues that the trial court erred in determining that plaintiff lacked standing. Because plaintiff has no substantial legal interest in the overfunding of the Retirement System, we conclude that plaintiff lacked standing to bring the instant claims.

In *Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.,* —— Mich. ——; NW2d —— (Docket No. 138401, decided July 31, 2010), the Michigan Supreme Court recently overruled *Lee v. Macomb Co. Bd. of Comm'rs,* 464 Mich. 726, 629 N.W.2d 900 (2001), under which, the "irreducible constitutional minimum" of standing contained three elements. Those elements were: (1) an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) a causal connection between the injury and the conduct complained of such that the injury is fairly traceable to the conduct, and (3) likelihood and not merely speculation that the injury will be redressed by a favorable decision.

The *Lansing Sch Ed Ass'n* Court stated that, "Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan's long-standing historical approach to standing." Slip op at 2. The *Lansing Sch Ed Ass'n* Court held that,

> a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2 .605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Here, we conclude plaintiff did not establish a legal cause of action because plaintiff has no right to receive any overfunding from the Retirement System. MCL 38.1140m expressly provides that, "[i]n a plan year, any current service cost payment *may* be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability." The word "may" designates discretion. *American Federation of State, County and Mun. Employees, AFL–CIO Michigan Council 25,* 214 Mich.App. 182, 542 N.W.2d 333 (1995). Thus, the decision to grant an offset to the employer if there is overfunding rests with the Board. Plaintiff cannot claim a right to the overfunding. Rather, plaintiff only has a right to receive the benefits due to its members. Plaintiff also maintains that the memorandum of understanding "was a binding contract between [p]laintiff, the Unions and the City [of Detroit]." However, the memorandum of understanding plainly states that "the parties believe that the Policemen and Firemen Retirement System is required to abide by the terms of the [m]emorandum of [u]nderstanding pursuant to applicable law *however the parties recognize the independence of the trust fund/Retirement System as a separate entity with fiduciary obligations.*" (Emphasis Added). The memorandum of understanding merely states the parties' aspirations in regard to whether the Board will distribute overfunding, if any, to all members of the Unions. Accordingly, plaintiff cannot establish a breach of contract on the basis of the memorandum of understanding.

*4 Further, we cannot conclude that plaintiff "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Sch Ed Ass'n,* at slip op 22. There is no dispute that the statutory scheme does not provide plaintiff the right to challenge a decision in regard to the distribution of overfunding in the Retirement System. In this respect, the circumstances are akin to *Policemen and Firemen Retirement System,* 270 Mich.App. 74, 714 N.W.2d 658. In that case, the Retirement System was underfunded and the city of Detroit attempted to enforce a city ordinance to extend the amortization period to 20 years, contrary to the Board's decision to adopt a 14–year amortization period. This Court held that the "the statutory language is unequivocal that the Board determines the amount the employer (Detroit) contributes annually to the retirement system and that the employer, in turn, is "required" to make the contribution." *Id .,* at 80–81, 714 N.W.2d 658. Further, that "[t]he Board's determination also necessarily includes the amount of time in which Detroit must pay the unfunded accrued pension liabilities because the period directly affects the amount Detroit must contribute to the plan each year." *Id.,* at 81, 714 N.W.2d 658. Similarly, here, the Board determines the amount that the city of Detroit contributes (and conversely does not contribute) annually to the Retirement System. Given that the city of Detroit cannot challenge the Board's determination in regard to the amortization period during a period of underfunding, it follows that plaintiff has no legal basis to challenge an offset granted during a period of overfunding.

Further, plaintiff fails to establish that its members have a special injury or right, or substantial interest that will be detrimentally affected by the Board's decision to grant the city of Detroit an offset because the Retirement System was overfunded. Plaintiff alleges that "[p]laintiff's members suffered an injury in fact because the Defendants' actions reduced the security of the plan without providing a compensating benefit for the reduced security," Plaintiff's concerns are misplaced, however, given that "Const 1963, art 9, § 24 provides that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Stated differently, plaintiff's action to recover any benefits owed lies in a contract against the city of Detroit. Plaintiff simply does not have an action against defendants.

Moreover, should any reduction of any benefit be realized, plaintiff has an action against the city of Detroit to recover any loss of benefit. Thus, although plaintiff may have standing to adjudicate an eventual claim in the event that its members are denied benefits, plaintiff's claim here is simply not ripe for adjudication. The requirement of ripeness precludes the adjudication of hypothetical or contingent claims. An action is not ripe if it rests on contingent future events. See *Hendee Putnam Tp.*, 486 Mich. 556, 786 N.W.2d 521 (2010). Because plaintiff lacks standing to assert a cognizable legal claim, and otherwise has not stated a justiciable claim, we affirm the trial court's decision dismissing plaintiff's action.

Footnotes

1 Plaintiff did not name the Retirement System in the complaint, but the Retirement System later intervened.

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